Supreme Court, U.S.
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No. 96-___

In The

Supreme Court of the United States

October Term, 1996

STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Questions Presented are:

1. Whether a claim brought by the State of California under the Invasion Clause of Article IV, § 4 of the United States Constitution, which provides that the United States "shall protect" every State in the Union "against Invasion", is justiciable in the context of a large-scale violation of California's borders by 125,000 illegal immigrants annually.

2. Whether the federal government has violated the Tenth Amendment by obligating California to provide emergency medical services to illegal aliens where it has permitted an influx of illegal immigration through its failure to police California's borders in violation of constitutional and statutory obligations.

PARTIES TO THE PROCEEDING

Petitioners (Plaintiffs and appellants in the court below):

State of California; Pete Wilson, Governor; Joe G. Sandoval, Secretary, Youth and Adult Correctional Agency; Tom Maddock, Acting Director, Department of Corrections; Francisco J. Alarcon, Chief Deputy Director, Department of the Youth Authority; Craig Brown, Director of Finance, State of California; Sandra Smoley, Secretary, Health and Welfare Agency, State of California; S. Kimberly Belshe, Director of Health Services, State of California.

Respondents (Defendants and appellees in the court below):

The United States of America; Janet Reno, Attorney General; Doris Meissner, Commissioner, Immigration and Naturalization Service, United States; Franklin Raines, Acting Director, U.S. Office of Management and Budget, United States.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is set forth in Appendix A and is reported at 104 F.3d 1086.

The decision of the United States District Court for the Southern District of California is set forth in Appendix B. It was not reported in the Federal Supplement, but was incorporated by reference in the Order Granting Motion to Dismiss set forth in Appendix C. Judgment was entered accordingly by the District Court, and is set forth in Appendix D.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 7, 1997. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are Article IV, § 4, United States Constitution; Tenth Amendment, United States Constitution; 8 U.S.C. §§ 1252(a)(2)(A); 1252(c); 1252(i); and 42 U.S.C. § 1396b(v). These provisions are set forth in Appendix E.

STATEMENT OF THE CASE

1. Nature of the Controversy

California is the victim of a massive, unlawful and continuing invasion of approximately 125,000 illegal immigrants across its borders every year.

Although California ceded control over immigration to the federal government when it joined the Union, the federal government has utterly failed to control this influx of illegal immigrants, to the end that California

now has residing within its borders more than 1.7 *million* illegal immigrants. The State, while powerless either to exclude or deport any of these individuals, must nonetheless pay the enormous costs attributable to their presence.

Respondents have a duty under the Invasion Clause of the United States Constitution, Article IV, § 4, to protect California from this massive and illegal onslaught. The fact that they have breached that duty cannot seriously be questioned. In fact, Respondents have failed to perform fully even their existing statutory duties to deport, or otherwise take responsibility for, those illegal aliens currently in the State.

By continually refusing and failing to comply with their constitutional and statutory duties, Respondents have commandeered California's legislative processes by requiring the State to absorb the enormous costs resulting from the overwhelming deluge of illegal aliens, in violation of the Invasion Clause of Article IV, § 4 of the United States Constitution, and the Tenth Amendment to the United States Constitution.

2. Proceedings Below

A. The Complaint

On April 29, 1994, Petitioners filed their complaint in federal District Court, seeking appropriate reimbursement from Respondents. Petitioners subsequently filed an amended complaint on September 22, 1994, set forth in Appendix F, alleging, *inter alia*, that aliens unlawfully migrate to California at a rate of 125,000 per year; that California has at least 43% of all undocumented aliens residing in the United States[1]; that these undocumented aliens constitute 5% of the population of California; that

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[1] As used in the amended complaint, the terms "undocumented" or "illegal" aliens refer to aliens not lawfully entitled to immigrate to the United States, who unlawfully entered and continue to unlawfully remain within California. (App. F-91.)

no other state even remotely approximates this level of illegal immigrants; and that California taxpayers are forced to spend millions of dollars each year to provide federally-mandated emergency medical services to undocumented aliens. (App. F-81; 91-92.)

The amended complaint[2] sought to illustrate the tremendous burdens imposed upon California as a result of the federal government's failure to protect California's borders from illegal immigration. It noted that California continues to face a massive influx of illegal immigrants, who comprise an estimated 1.7 million of California's population as of the date the complaint was filed,[3] and who continue to enter California at a rate of 125,000 per year. (App. F-92.)

The complete failure of the federal government to protect California from this invasion has resulted in forced payments for emergency medical services for an estimated 317,500 undocumented aliens in Fiscal Year 1994-95. (App. F-102.) Between Fiscal Years 1988-89 and 1994-95, California paid approximately $1.8 billion to fund these services. *Ibid*, and an additional $3.3 billion to fund the incarceration and parole supervision of illegal aliens convicted of felonies. (App. F – 116-117.) Further, as alleged in the amended complaint, Respondents: have failed to begin deportation proceedings as expeditiously as possible after the date of conviction of an illegal alien of a deportable offense, as is statutorily required; have failed to take into custody undocumented aliens convicted of aggravated felonies, as is statutorily required; have failed to prosecute those undocumented aliens who have been deported, but reenter this country; and have

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[2] Petitioners do not seek review in this Court of the issues presented by Counts III and V through IX, or of the cause of action for violation of the Guarantee Clause of the Constitution (Art. IV, § 4) in Count II. Petitioners' amended complaint does not contain a Count IV.

[3] Current figures put the number at 2.1 million.

failed to effect deportations designed to prevent further reentry into this country. (App. F-127; 139; 141.)

The amended complaint sought declaratory and injunctive relief for, among others, the claims raised in this Petition under: (i) the Invasion Clause of Article IV, § 4 of the Constitution, and (ii) the Tenth Amendment to the Constitution. For the violation of these constitutional provisions, the amended complaint sought: a declaration that Respondents are not performing their constitutional and statutory duties; an order that Respondents prepare and implement a plan for fulfilling their duties; and reimbursement of the State's costs for providing emergency health care made necessary by the Respondents' failure to protect the State's borders.[4] (App. F-155-156.)

B. Basis for Jurisdiction in the District Court

Jurisdiction was based on 28 U.S.C. §§ 1331; 1361; 2201; 2202; 1346; and the Administrative Procedure Act, 5 U.S.C. §§ 701-706. (App. F-89-90.)

C. The Ruling of the District Court

The District Court granted the federal government's motion to dismiss, finding that Count I (brought under

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[4] Arguments based on the Invasion Clause of Article IV, § 4 and the Tenth Amendment to the United States Constitution that are similar, but not identical, to those made in Counts I and II in this case have not been successful in courts in Florida (*Chiles* v. *United States of America*, 69 F.3d 1094 (11th Cir. 1995), *cert. denied*, 116 S.Ct. 1674 (1996)); Arizona (*State of Arizona* v. *United States*, 104 F.3d 1095 (9th Cir. 1997); New York (*Padavan* v. *United States*, 82 F.3d 23 (2nd Cir. 1996)); and New Jersey (*State of New Jersey* v. *United States*, 91 F.3d 463 (3rd Cir. 1996)). Petitioners submit these cases are wrongly decided.

the Invasion Clause) presented a nonjusticiable political question (App. B-34) and failed to state a claim for violation of the Invasion Clause because the adverse effects caused by the presence of illegal aliens in California did not constitute a "hostile encroachment" of California's borders inasmuch as the illegal entrance was not hostile, but undertaken to improve the intruders' economic lot. (App. B-31-32.) The Court, however, determined that the State had standing, holding that the allegations contained in the amended complaint were sufficient to demonstrate a causal connection between Respondents' failure to perform their constitutional and statutory duties and the claimed injury – in the form of additional illegal immigration – to the State. (App. B-30-31.)

The District Court dismissed Count II, which alleged a violation of the Tenth Amendment, on the ground that the State's legislative processes were not commandeered by the fact that Congress conditioned California's continued participation in the federal Medicaid Program on the State's agreement to provide emergency medical services to illegal immigrants. (App. B-37-38.)

The District Court dismissed Count V (claiming a failure to begin deportation proceedings expeditiously after conviction of an illegal immigrant in accordance with 8 U.S.C. § 1252(i)) on the ground that, in enacting the Immigration and Nationality Technical Corrections Act of 1994, § 225, Public Law 103-416, Congress had made clear that 8 U.S.C. § 1252(i) "is simply a directive to the Attorney General and not a judicially enforceable right." (App. B-42.)

The District Court dismissed Counts VI, VII and VIII for the reason that the sections of the Immigration and Nationality Act at issue give the Attorney General discretion in the performance of her duties such that neither declaratory nor injunctive relief is appropriate. (App. B-43-46.)

Finally, the District Court found that all claims for reimbursement of costs incurred as a result of the presence of illegal aliens (for which each claim also had an injunctive component) were barred by sovereign immunity, and dismissed Counts I and II on that additional, alternative ground. (App. B-47-48.)

D. The Ruling of the Appellate Court

The Ninth Circuit Court of Appeals affirmed the judgment of the District Court. With respect to the claim for violation of the Invasion Clause in Count I, the Court of Appeals ruled that the issue presented a nonjusticiable political question. (App. A-11-12.) The Court sought to justify its holding on the ground that "there are no manageable standards to ascertain whether or when an influx of illegal immigrants should be said to constitute an invasion." (App. A-12.) Further, the Court held that California's position (that the Invasion Clause was not limited to invasions by foreign armies) ignored the conclusions drawn by our Constitution's Framers in The Federalist No. 43, in which James Madison stated that the protection due a state under Article IV, § 4 is from "foreign hostility" and "ambitious or vindictive enterprises" on the part of other states or foreign nations; that is, the constitutional provision was not intended to be used in the manner urged by California. (App. A-13.)

The Court of Appeals upheld the dismissal of the Tenth Amendment challenge to the Medicaid Program requirement that California provide emergency medical services to illegal immigrants (Count II) by holding that a state which is free to raise taxes cannot claim it was coerced by the withholding of federal funds. In response to California's argument that it had no choice but to accept the federal government's conditioning of Medicaid funds on California's payment of illegal alien health care costs, the Ninth Circuit cited one of its recent decisions

for the observation that "no party challenging the conditioning of federal funds has ever succeeded under the coercion theory." (App. A-15-16.) In addition, the Court of Appeals upheld the dismissal of the Tenth Amendment claims on the ground that they presented nonjusticiable political questions beyond the authority of the judicial branch. (App. A-18.)

The Court of Appeals upheld the denial of equitable relief in Counts V, VI, VII and VIII, all of which challenged the refusal of federal agencies to comply with their statutory duties to enforce the immigration laws as specified in those statutes, on the ground that the enforcement of those laws was a matter within Respondents' discretion. The Court also held that a refusal to initiate enforcement proceedings fell within the exception to reviewability provided by 5 U.S.C. § 701(a)(2) (Counts V, VI and VII) (App. A-21), and that Respondents' interpretation of the Immigration and Nationality Act was sufficiently reasonable to divest a federal court of authority to review the challenged actions (Count VIII). (App. A-22-23.)

Finally, the Court of Appeals upheld the dismissal of Counts I and II on the alternative ground that, to the extent those claims sought monetary awards, they were barred by the doctrine of sovereign immunity. (App. A-23-24.)

REASONS FOR GRANTING THE WRIT

I. THE INTERVENTION OF THE SUPREME COURT IS NEEDED TO ADDRESS THE WHOLESALE WITHDRAWAL FROM JUDICIAL REVIEW OF A CONSTITUTIONAL SECTION WITH WIDESPREAD IMPLICATIONS FOR FEDERALISM.

This Court's review of California's claims is of paramount importance. Although the present matter does not

involve a "conflict" among courts, it does raise an important issue of constitutional law that has not been, but should be, settled by this Court, and that is in conflict with recent decisions of this Court. *See* S. Ct. Rule 10.

The unwarranted extension by the Ninth Circuit Court of Appeals of the "nonjusticiability" doctrine to foreclose adjudication of the unequivocal obligation of the United States to protect the States from invasion under Article IV, § 4 is of utmost importance to this Court's recent federalism decisions. In dismissing California's Article IV, § 4 "Invasion Clause" claim as a nonjusticiable political question, the Ninth Circuit has rendered hollow and superfluous the Constitution's command that the federal government "protect" California "against Invasion." A decision that the states cannot enforce the federal government's obligations because they purportedly raise "political" questions undermines the federal-state balance.

Recent decisions of this Court underscore the importance of judicial review of governmental activity that adversely affects the federal-state balance. Four cases decided by this Court in the past six years could have been avoided under the "nonjusticiability doctrine." *See Gregory* v. *Ashcroft*, 501 U.S. 452 (1991); *New York* v. *United States*, 505 U.S. 144 (1992); *United States* v. *Lopez*, 514 U.S. 549, 115 S.Ct. 1624 (1995); *Seminole Tribe of Florida* v. *Florida*, ___ U.S. ___, 116 S.Ct. 1114 (1996). Yet, in each case, the Court entertained review of federal laws on federalism grounds. "[R]ather than accept the decision of the elected coordinate branches, the Court moved forward . . . to draw clear lines between the enumerated powers of the federal government and the sovereignty of the states." John C. Yoo, *The Judicial Safeguards of Federalism* (Feb. 2, 1997) (unpublished manuscript).

The present case involves an issue of national importance that has yet to be addressed by this Court – whether the federal government, with impunity and

without any safeguard from a coordinate branch of government, can flout its constitutional obligation to protect the states from illegal immigration. The justifications set forth by the Court in support of its review of recent federalism cases makes the answer clear: The federal government may not do so. In language that exposes the fallacy of the Ninth Circuit's extension of the non-justiciability doctrine to the federal government's obligation to protect the states, Justice Kennedy explained in a concurring opinion in *Lopez* that the absence of structural mechanisms which would require federal officials to comply with their tasks argues against a "complete renunciation of the judicial role":

> [T]he absence of structural mechanisms to require those officials to undertake [the] principled task [of policing federalism boundaries], and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role. [T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one of the other levels of government has tipped the scales too far.

115 S.Ct. at 1639 (Kennedy, J., concurring).

California's ability to rectify this situation adequately through the political process is stifled by the fact that it is one of but seven states forced to shoulder virtually all the consequences of illegal immigration in this country. The constitutional obligation that the United States protect the states from invasion should be enforceable in light of a massive, unlawful and continuing invasion of approximately 125,000 illegal immigrants annually across California's borders. Indeed, the amended complaint alleges, and representatives of all three branches of the federal government have admitted, that illegal immigration is out of control and has not been adequately addressed for years.

As in *Ashcroft*, *New York*, *Lopez* and *Seminole Tribe*, judicial review of the present matter should not be forfeited merely because the federal government possesses plenary authority over commerce or, in this case, immigration. *See Seminole Tribe*, 116 S.Ct. at 1127 ("we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government."). The Court, for these reasons, should exercise judicial review over the national issue of immigration, since this Court's recent decisions establish that a state's constitutional role in the federal balance cannot be left to protection solely by the political branches of government.

II. CLAIMS BASED ON THE INVASION CLAUSE ARE JUSTICIABLE.

The clarity of the Invasion Clause should foreclose objections that California's Invasion Clause claim is nonjusticiable. The clause provides that "[t]he United States . . . shall protect each of them [the states] against Invasion." Art. IV, § 4. It is the only clause in the Constitution to impose on the United States – by its corporate name – a cognizable duty. (*Contra* Art. IV, § 3, cl. 2, immediately preceding the section: "*The Congress* shall . . . ") (emphasis added). Yet, the federal government now claims that the only section of the Constitution that imposes a cognizable duty on the United States is not justiciable.

Fifteen years ago, five Justices of this Court explicitly stated that the financial consequences of the federal government's failure to enforce the nation's borders adequately against illegal immigration should be shouldered not by the states, but by the federal government.

> It does not follow . . . that a state should bear the costs of educating children whose illegal

> presence in this country results from the default of the political branches of the Federal Government. A state has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the Executive. If the Federal Government, properly chargeable with deporting illegal aliens, fails to do so, it should bear the burdens of their presence here.

Plyler v. *Doe*, 457 U.S. 202, 242 n.1 (1982) (Burger, C.J., dissenting, joined by Rehnquist, O'Connor and White, JJ.); *see also id.* at 241 (Powell, J., concurring) (acknowledging the federal government's fiscal responsibility to the states for its default).

If ever this dictum is to be given meaning, that time is the present. In entering the federal compact known as the United States Constitution, California relinquished control over its borders *in exchange for* the federal government's covenant to protect those borders effectively from "Invasion." Art. IV, § 4. Yet, the federal government has failed to abide by this constitutional covenant, eliciting recognition from legislative officials that an "invasion" has occurred and that the Administration's enforcement of immigration laws remains "antiquated and ineffective."[5] The Executive Branch, too, admitted as long ago as 1981 that "We have lost control of our borders. We have pursued unrealistic policies. We have failed to enforce our laws effectively." Comments of the United States

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[5] Remarks of Rep. Lowery, 132 Cong. Rec. 3466 (1988); Stmt. of Rep. Rogers before the House of Representatives Appropriations Committee (unofficial transcript) (March 4, 1997). *See also* 140 Cong. Rec. H 2998, § 35 (1994) ("the Federal Government has not adequately enforced immigration laws"; "this weak enforcement has imposed financial costs on State and local governments.").

Attorney General, quoted in *Louis* v. *Nelson*, 544 F. Supp. 973, 980 (S.D. Fla. 1982).[6]

Absent the review of this Court, California and other states will for the foreseeable future be denied redress under Article IV, § 4 for a large-scale unlawful invasion across their borders. Between the federal government's failure to protect California from massive unlawful immigration, and its concomitant position that the constitutional command is nonjusticiable, this Court's review becomes imperative to ensure that California's constitutional right to "protect[ion] . . . against Invasion" does not become an empty shell.

A. THIS CASE IS JUSTICIABLE BECAUSE IT SEEKS A JUDICIAL INTERPRETATION OF THE CONSTITUTION.

The federal courts are constitutionally required to adjudicate California's Invasion Clause claim since it raises an issue requiring a straightforward interpretation of the Constitution. The host of justifications given by the Ninth Circuit to cast the claim as a "political question" overly extends the invocation of the "political question" doctrine to avoid interpreting constitutional provisions. California's claim is justiciable because it (i) seeks a constitutional adjudication, not an election by the courts of competing policies; (ii) presents the courts with a manageable standard upon which to adjudicate the dispute; (iii) permits a discrete remedy that does not threaten to mire the courts in a determination of extra-judicial relief;

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[6] The Judiciary also has taken note of "the serious national problems caused by the influx of uncountable millions of illegal aliens across our borders." *Plyler*, 457 U.S. at 242 (Burger, C.J., dissenting.) And, the District Court in this case acknowledged that "the State of California does have valid concerns about the financial drain caused by an issue over which it has no jurisdiction; that is, the control of the border." (App. B-26.)

and (iv) does not pose the risk of an unseemly conflict between the judiciary and other governmental branches. For these reasons, the Court should grant certiorari to hold that California's claim for relief under the Invasion Clause is justiciable.

1. California's Invasion Clause Claim Meets The Requirements Set Forth By This Court For A Claim To Be Considered "Justiciable."

California's Invasion Clause claim is justiciable since it presents a pure constitutional claim that the federal government is obligated to protect California from "invasion" – in this case in the form of a massive unlawful transgression of its borders. In *Japan Whaling Ass'n* v. *American Cetacean Soc.*, 478 U.S. 221, 230 (1986), this Court ruled that while "[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch", the courts do have authority to construe treaties, executive agreements, the Constitution and statutes. The Court in *Japan Whaling* exercised judicial review over what was objected to as a quintessentially political issue: whether the Secretary of Commerce was statutorily required to certify Japan as a country whose nationals were conducting fishing operations which diminished the effectiveness of the International Convention for the Regulation of Whaling. This Court dismissed the petitioners' argument under *Baker* v. *Carr* that the issue was unsuitable for judicial review because of the "danger of 'embarrassment from multifarious pronouncements by various departments

on one question.' "[7] *Japan Whaling*, 478 U.S. at 229. Rather, the Court noted, "not every matter touching on politics is a political question." *Id.*

In this case, California's constitutional claim is analytically indistinguishable from the statutory claim plaintiffs raised – and the Court reached – in *Japan Whaling*. In both cases, a challenge was brought to redress executive branch inaction that implicated international and political considerations. *See Japan Whaling*, 478 U.S. 221.

California's Invasion Clause claim does not fall within the category of "political questions" excepted from judicial review, because adjudication of the claim would not involve the Court in "policy choices and value determinations *constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch*", as explicated in *Japan Whaling*. 478 U.S. at 230 (emphasis added). To the contrary, adjudication of California's claim requires solely an interpretation of the "Invasion Clause", which requires "[t]he United States" to "protect" California "against Invasion." Art. IV, § 4. A chief "responsibility of this Court [is to be the] ultimate interpreter of the Constitution", *Baker* v. *Carr*, 369 U.S. 186 (1962), and the Court "cannot shirk this responsibility merely because [its] decision may have significant political overtones." *Japan Whaling*, 478 U.S. at 230. The authority for this obligation reaches as far back as *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803).

In contrast, from its origination in *Luther* v. *Borden*, 48 U.S. (7 How.) 1 (1849) (finding nonjusticiable the issue of which competing group was the legitimate governmental authority during Rhode Island's Dohr Rebellion), the

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[7] Further, there is no danger of "embarrassment from multifarious pronouncements by various departments" in the present case, inasmuch as all branches of the federal government *have admitted* that illegal immigration is out of control.

nonjusticiability doctrine has evolved to cover a variety of situations that call for *more* than a constitutional or statutory construction. *Baker*, 369 U.S. at 209-17 (setting out categorical listing of situations in which the "political question" doctrine had been invoked). Each such situation – as well as the authorities relied upon by the Ninth Circuit in affirming the dismissal of California's claim – is distinguishable. For example, in *Barber* v. *Hawaii*, 42 F.3d 1185, 1199 (9th Cir. 1994), cited by the Ninth Circuit, a claim that lawful "economic invasion" of Hawaii by Japanese investors triggered Invasion Clause was properly dismissed because equating *lawful* foreign investment with "invasion" would require a judicial policy judgment.[8] In contrast, Congress has already determined that illegal immigration is unlawful. The courts need only construe the Invasion Clause to cover a massive illegal incursion of a state's borders.

2. California's Claim May Not Be Deemed Nonjusticiable On The Ground That, As Found By The Ninth Circuit, It Touches Upon Foreign Policy Questions.

It is no impediment to judicial review that California's claim may touch upon foreign policy questions. *See Japan Whaling*, 478 U.S. at 230. The Ninth Circuit erroneously held this case nonjusticiable on the ground that "[f]or this Court to determine that the United States has been 'invaded' when the political branches have made no such determination would disregard the constitutional duties that are the specific responsibility of other

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[8] The Ninth Circuit also relied on various appellate decisions finding nonjusticiable claims against illegal immigration brought by other states based on the Invasion Clause. (App. A-15.) The State of California respectfully submits these decisions are, for the reasons set forth in this brief, wrongly decided. *See supra* n.4.

branches of government, and would result in the Court making an ineffective, non-judicial policy decision." (App. A-12.) This statement misstates the issue.

California's pleadings have not asked the courts to make a foreign policy determination, but have instead sought a judicial determination that (i) the Executive Branch has an enforceable obligation to "protect" California "against Invasion", under Article IV, § 4, and (ii) that the constitutional protection against invasion must be construed to include a massive unlawful immigration. *See Japan Whaling*, 478 U.S. at 230 ("*Baker* plainly held . . . the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the courts."). *See also Abourezk* v. *Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 472 U.S. 846 (1985) (that the federal government has broad discretion over immigration matters does not permit it to transgress constitutional or statutory limits; "[it] is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie.").

Adjudication of California's Invasion Clause claim only requires the Court to determine that the massive illegal encroachment of California's borders is covered by the Invasion Clause. Indeed, Congress has already determined that the breach of any state's borders by immigrants who fail to gain legal entry into the United States is illegal, such that no foreign policy issue is implicated. The Congress having determined that illegal immigration is in breach of our laws, the courts need only determine whether a massive violation of California's borders by those already defined as illegally doing so amounts to an invasion – where that number exceeds the size of many foreign armies.

3. The Invasion Clause Presents A "Manageable Standard" By Which The Courts May Litigate This Dispute.

The standards upon which the Court could resolve this litigation are not merely "manageable", they are readily cognizable under the Constitution.

a. A Massive Incursion Of Illegal Immigrants Constitutes An "Invasion" Within The Contemplation Of The Constitution.

The term "invasion", as used in Article IV, § 4, should be deemed to encompass a massive unlawful incursion across California's borders, since such an interpretation is supported by (i) a contemporaneous understanding of the meaning of "invasion", (ii) the construction applied to the term in the Federalist Papers, and (iii) the decisions of this Court. In rejecting Petitioners' claim under the Invasion Clause, the Court of Appeals held that the Clause applies only to military invasions (even though it is not so limited on its face) and that the claim presents no justiciable issue. (App. A-11; 13.) However, the Invasion Clause does not limit its protection to "military" invasions, but guarantees protection against *all* invasions. While the Framers may not have envisioned the exact application the State now claims, it is clear that they did not intend to limit the Clause's applicability in the manner construed by the Court of Appeals.

At the time of the framing of the Constitution, an "invasion" was commonly understood *not* to be limited to a foreign military hostility. Rather, as defined in Samuel Johnson's *Dictionary of the English Language* (1755), an "invasion" was a "hostile entrance upon the rights or possessions of another; hostile encroachment." Although the Framers could have drafted the Invasion Clause more narrowly to protect states against "armed invasion" or

invasion "by foreign armies", they did not do so, but instead left the clause unqualified.

Petitioners' interpretation of "invasion" is also supported by the Federalist Papers, which emphasize the "latitude of expression" in the wording of the Invasion Clause. As Madison stated, "A protection against invasion is due from society to the parts composing it. The latitude of the expression here used seems to secure each State not only against foreign hostility, but against ambitious or vindictive enterprises of its more powerful neighbors." *The Federalist No. 43*, at 292-93 (Cooke ed., 1961).

Finally, the decisions of this Court establish that the term "invasion" was meant to cover massive immigration. *See The Chinese Exclusion Case*, 130 U.S. 581 (1889) (United States had authority to enact legislation to effect the expulsion from the country of Chinese laborers in violation of existing treaties, as the United States had that power based in part on its authority under Article IV, § 4 to protect the states against invasion).[9]

A big question, of course, is how large an illegal border incursion must be to constitute an "invasion", as opposed to an incursion. Petitioners suggest that if the illegal incursion is greater than a state can reasonably be expected to respond to on its own, it is an invasion. As is obvious, Petitioners are not complaining of the occasional illegal border crossing from Mexico or boatload of illegal immigrants from across the ocean. The illegal immigrant problem in California exists at the other end of the continuum.[10]

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[9] *See also In re Impaneling and Instructing the Grand Jury*, 26 F. 749, 751 (D. Ore. 1886) ("[T]he United States has the same right to prevent an immigration within its boundaries, of people that it deems objectionable, as it would have to repel an armed invasion by them.").

[10] As of the date the Complaint was filed, there were an estimated 1.7 *million* illegal immigrants in California, with the number increasing by 125,000 annually.

As alleged in the complaint, the situation in California long ago passed the point where reasonable minds could differ: the overwhelming illegal entry across California's borders is nothing short of an invasion. In denominating this as a political question, both the District Court and the Court of Appeals avoided addressing the fact that at least 1.7 million people are here *illegally*.[11] Because the mandate protecting California from invasion is found in the text of the Constitution, and is capable of meaningful judicial construction, California's Invasion Clause claim should not be foreclosed as nonjusticiable for lack of definable standards.

The mere fact that the Framers did not anticipate the form of invasion for which California seeks protection does not preclude adjudication of its claim. Where necessary, the Court has not hesitated to apply constitutional principles to circumstances unforeseen at the time of the constitutional provision's enactment. For example, in *Brown* v. *Board of Education*, 349 U.S. 294 (1955), the Court considered the circumstances surrounding the adoption of the Fourteenth Amendment in 1868, and recognized that at that time, public education was in a nascent stage throughout the country. *See Brown*, 347 U.S. at 489 ("As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education."). Notwithstanding, the Court determined that Fourteenth Amendment principles should be applied to public education to enable a determination whether segregation in public schools deprived African American students of the equal

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[11] In fact, the District Court opinion suggested that some might believe Petitioners' lawsuit to be motivated by xenophobia, a conclusion for which there is no support in the record or in fact, but which has the unfortunate effect of blaming the victim of the illegal act for its occurrence. (App. B-27.)

protection of the laws. *Id.* at 492-493. That is, this Court concluded it had to look at the *effect* of segregation on public education. *Id.* at 492. This analysis is analogous to Petitioners' position that, even if the Framers did not have in mind today's problems with illegal immigration when they drafted Article IV, § 4, the Court may nonetheless determine that the *effects* of illegal immigration on California are properly encompassed by constitutional principles enunciated at Article IV, § 4.

a. This Matter Is More Readily Capable Of Judicial Resolution Than Other Constitutional Provisions.

The clarity of Article IV, § 4 can be contrasted with less explicit constitutional directives which have nonetheless been found capable of judicial resolution. It is simply implausible to accept that courts are capable of defining – and remedying violations for – such terms as "searches and seizures", "just compensation", "cruel and unusual punishments" and "equality", yet have no idea what an "invasion" might be, such that a claim based on this clause is not justiciable,[12]. Notably, even with the "prevailing skepticism that surrounds our ability to give meaning to the explicit text of the Commerce Clause", *id.* at 1640 (Kennedy, J., concurring), this Court in *Lopez* exercised judicial review to determine the constitutionality of congressional legislation. *See also County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring) ("We cannot avoid the obligation to draw

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[12] In the related context of Article IV's Guarantee Clause, *see* Note, *A Niche for the Guarantee Clause*, Harvard Law Review 692-93 (1981) ("If standards are lacking under the Guarantee Clause, it is less because of any special vacuity of the language than because courts have been unwilling to develop standards as they have under the equal protection clause.").

lines, often close and difficult lines" in adjudicating constitutional rights.).

The explicit mandate of the Invasion Clause provides the Court with yet greater reason than existed in *Lopez* to adjudicate the present claims. *See also, e.g., Davis* v. *Bandemer*, 478 U.S. 109 (1986) (accepting task of policing political gerrymandering as "susceptible of adjudication under the applicable constitutional criteria", over dissent decrying lack of judicially manageable standards to govern heated partisan redistricting battles in federal court); *Skinner* v. *Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (applying Fourth Amendment analysis to challenge of drug testing scheme); *Dolan* v. *Tigard*, 512 U.S. 374 (1994) (interpreting Fifth and Fourteenth Amendments in adjudicating Takings Clause claim); *Farmer* v. *Brennan*, 511 U.S. 825 (1994) (interpreting Eighth Amendment to derive standards for liability of prison officials); *Baker*, 369 U.S. 186 (striking Tennessee's system of representation as violative of the Fourteenth Amendment without directing remedy).

4. California's Invasion Clause Claim Presents A Request For Discrete Relief That Would Not Impose Upon The Courts The Task Of Extra-Judicial Decisionmaking.

It is simply wrong – not to mention ironic – for the Ninth Circuit to declare as a matter of jurisprudence that California's Invasion Clause claim is too indefinite to yield a constitutional remedy. No constitutional obligation can or should be avoided because of a difficulty in rendering an effective remedy. Unlike the "exclusionary rule" and "*Miranda* warning", for example, which were implied by the Court to provide a remedy, California has suggested a variety of *traditional* remedial measures that range from a declaratory judgment that the Executive Branch has failed to accord constitutional "protect[ion]"

"against Invasion" to California, to an injunction requiring the Executive Branch to strictly enforce its present statutory duties in combating illegal immigration. For example, 8 U.S.C. § 1252(i) [now § 1228(a)(1)] requires the Attorney General and the INS to begin deportation proceedings as expeditiously as possible after the date of conviction of an alien of a deportable offense. Respondents, however, have adopted and implemented a policy to institute deportation proceedings at or near the end of the sentence, not upon the date of conviction. (App. F-126-127.) Similarly, 8 U.S.C. § 1326 requires the Attorney General to fine or imprison any alien who has been arrested and deported and thereafter re-enters. Respondents, however, limit enforcement to serious repeat offenders only. (App. F-139.) *See also, e.g.*, 8 U.S.C. § 1252(a)(2)(B) [now § 1226(c)]; § 1252 (c) [now § 1231]. (App. E.)[13]

In the present case, each of the statutes Respondents are alleged to have violated imposes on them a mandatory duty to act. The Ninth Circuit concluded that these statutory duties could not be enforced. But strict compliance with those standards provides a clear remedy for Respondents' failure to protect California against this massive incursion of illegal immigrants. Moreover, the relief which courts have accorded to other constitutional violations – such as construction of prison libraries for prisoners, racial integration plans, and redrawing congressional districts – can hardly be deemed more "manageable" than that which might be required under the Invasion Clause. *See, e.g., Bounds* v. *Smith*, 430 U.S. 817, 828 (1977) (under Eighth Amendment, prisons lacking

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[13] Petitioners acknowledge that there has been some improvement by Respondents in enforcement of these statutes since this lawsuit was instituted. However, this improvement is clearly insufficient, and Respondents are free to return to their old ways.

legal assistance staff were required to provide prisoners with law libraries); *Hills* v. *Gautreaux*, 425 U.S. 284, 306 (1976) (under Fourteenth Amendment, sanctioning metropolitan area-wide relief by federal judiciary to stem public housing discrimination); *Connor* v. *Finch*, 431 U.S. 407 (1977) (under Fourteenth Amendment, authorizing district court on remand to draw legislative districts to cure dilution of minority representation). The remedy sought by California is, therefore, sufficiently definite to render this matter justiciable.

5. This Case Does Not Present The Possibility Of An Untoward Conflict With The Executive And Legislative Branches.

It is no justification for the Ninth Circuit's "nonjusticiability" holding that a judicial remedy of the type sought by California could impermissibly conflict with the authority of the other branches of the federal government. The judiciary has determined the legality of a legislative veto, of an executive agreement for the release of U.S. hostages in Iran, of the assertion of executive privilege, and of the President's seizure of steel mills based on a Presidential claim of national emergency. *See, e.g., INS* v. *Chadha*, 462 U.S. 919, 942-43 (1983) (over nonjusticiable political question objection, adjudicating challenge to legislative veto; "the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine"); *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981) (reaching merits over legality of executive agreement for the release of U.S. hostages in Iran); *United States* v. *Nixon*, 418 U.S. 683 (1974) (no political question even given intra-executive nature of dispute between President and Special Prosecutor; ordering President to turn over Watergate evidence); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (invalidating executive's seizure of steel mills over executive claim of

national emergency).[14] The declaratory or limited injunctive relief that would be required to remedy the executive's constitutional failure under the Invasion Clause in this case is mild in comparison to the above encroachments, and should therefore pose no barrier to the adjudication of this claim.

6. Judicial Decisions Pronouncing Litigation Commenced Under Article IV, § 4 "Nonjusticiable" Are Inapposite.

California's Invasion Clause claim is justiciable notwithstanding the "state of some confusion" surrounding the federal judiciary's adjudication of cases under Article IV, § 4, particularly those based on the "Guarantee Clause."[15] Tribe, *American Constitutional Law* 96 (1988). *See also* Bork, *The Tempting of America* 85 (1990)(decisions finding Article IV, § 4 litigation nonjusticiable made "for no good reason"). Indeed, this Court recently observed

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[14] Likewise, the possible remedies for this case do not reach as far as the judicially-imposed intrusions sanctioned by this Court into other functions of the executive and legislative branches. *See, e.g., United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (prohibiting executive's assumption of congressionally-delegated power to sell arms to countries engaged in armed conflict); *Powell* v. *McCormack*, 395 U.S. 486, 549 (1969) ("[o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch"; finding error in House resolution that forbade representative from taking seat, notwithstanding constitutional commitment of issue to House as "the Judge of the . . . Qualifications of its own Members", Art. I, § 5, cl. 1).

[15] The Court has on some occasions adjudicated merits dispositions of Guarantee Clause adjudications, *see, e.g., Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162 (1875); *In re Duncan*, 139 U.S. 449 (1891), and on others referred to litigation under the clause as being nonjusticiable. *See Baker*, 369 U.S. at 225.

that Article IV's Guarantee Clause could be an appropriate vehicle for a state's claims, addressing in dicta the merits of an Article IV claim after citing to the considerable body of scholarship "suggest[ing] that courts should address the merits of such claims, at least in some circumstances." *New York*, 505 U.S. at 183-86.

In any event, those cases that have ruled that litigation brought under that Article is nonjusticiable are readily distinguishable from the case at bar, since they characterize the lawsuits as claiming the conferral of "judicially cognizable rights upon *individuals*." Tribe at 398 (emphasis in original) (noting that such claims have been subsumed by the Fourteenth Amendment). In contrast, "it need not follow . . . that the clause confers no judicially enforceable rights upon *states as states*." *Id.* (emphasis in original) (suggesting Article IV, § 4's Guarantee Clause to contain the "textual guarantee of republican government" responsive to federalism concerns expressed in *Federal Energy Regulatory Commission* v. *Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., dissenting)). California's claim under the Invasion Clause should therefore not be considered foreclosed by the litany of decisions finding Article IV challenges under the Guarantee Clause beyond the ken of the federal judiciary.

III. THE FEDERAL GOVERNMENT HAS COERCIVELY USED ITS SPENDING POWERS IN VIOLATION OF THE TENTH AMENDMENT IN REQUIRING CALIFORNIA TO PROVIDE EMERGENCY MEDICAL SERVICES TO ILLEGAL ALIENS.

Petitioners contend that the federal government's double punch – the imposition on California of the obligation that it pay 50% of the emergency health care costs for its undocumented aliens, coupled with the federal government's failure to stop or reduce the flow of illegal

immigrants into the State – violates the Tenth Amendment to the Constitution. California has been required by the federal government through mandated amendments to the Medicaid program in the Omnibus Budget Reconciliation Act of 1986 ("OBRA 86") amendments to the Social Security Act (part of a comprehensive package of immigration reform legislation (Public Law 99-509, 100 Stat. 3359)) to provide emergency medical services to undocumented aliens inasmuch as the federal government pays only 50% of such added costs. These amendments require California to pay for emergency health care services to illegal immigrants whose presence is the direct result of the federal government's failure to adequately police California's borders from illegal immigration.[16]

The federal government has violated the Tenth Amendment in thrusting these additional health care costs on California. Under *New York*, 505 U.S. at 188, this Court ruled that "[w]hatever the outer limits of [state] sovereignty may be, one thing is clear: the Federal Government may not compel the States to enact or administer a federal regulatory program." In this case, the federal government has compelled the State to amend its Medicaid statutes and enact appropriations to provide emergency health care to illegal immigrants, since California never possessed anything other than the illusory

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[16] In Fiscal Year 1992-93, the State was required to provide emergency services to approximately 299,000 OBRA 86 aliens at a State General Fund cost of $337.5 million (App. F-101); approximately 317,500 OBRA 86 aliens would be eligible to receive emergency services in Fiscal Year 1994-95, *ibid.*; and between Fiscal Years 1988-89 and 1994-95, the State would spend approximately $1.8 billion from its General Fund to provide emergency health care to OBRA 86 aliens (App. F-102), while the State's total Medi-Cal costs for the same period would be over $30 billion. (App. F-104.)

"option" of withdrawing from Medicaid for dislike of the OBRA 86 additions. Admittedly, California voluntarily chose to join the Medicaid program in 1965. By 1986, however, the Medicaid program had become so essential a strand in the fabric of the State's health care delivery system to the poor that, had that strand been pulled, California's health care delivery system would have unraveled completely. (App. F-95-106.) It is simply a legal fiction to suggest that, after twenty years of participation in the Medicaid program, California could withdraw from Medicaid in order to reject the 1986 amendments. To do so would have required California to forfeit *all* its Medicaid co-payments – a practical and financial impossibility.

The courts below failed to recognize that the federal government's breach of its constitutional and statutory obligations to stem illegal immigration, in conjunction with California's obligation to pay emergency health care costs for illegal aliens following its coerced "choice", violates the Tenth Amendment. The District Court held that California's participation in Medicaid was "voluntary" and that California was free to choose whether to accept a condition that Congress had attached to the states' receipt of federal funds under its Spending Clause powers. (App. B-37.) The Court of Appeals affirmed, opining that no sovereign state can ever be coerced by the withholding of such funds when it is always free to increase its own tax revenues.[17] (App. A-16.) In making these findings of no coercion, the courts below ignored the fact that the State *has no control over the situation whatsoever*. California does not quarrel with the concept

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[17] Whether California is free to increase its tax revenues is a question of fact. Petitioners' amended complaint alleges that the State is limited in its ability to raise its tax revenues and no evidence to the contrary was introduced before the District Court. (App. F-109-111.)

that Congress may place conditions on the receipt of federal funds. However, where the federal government imposes an additional condition midway through a funding program and is *itself* responsible for the circumstances that coerce the state into making significant subsidies, the state is being deprived of power and choice in violation of the Constitution.

The federal government's imposition on California of mounting illegal alien health care costs, following its coercion of California to pay 50% of the costs of such medical care, amounts to compulsion in violation of the Tenth Amendment under *South Dakota* v. *Dole*, 483 U.S. 203 (1987). California recognizes that this Court has not invalidated an Act of Congress under the Spending Clause since *United States v. Butler*, 297 U.S. 1 (1936). *But cf. Lopez*, 514 U.S. 549; *Seminole Tribe*, ___ U.S. ___, 116 S.Ct. 1114. But, as this Court recently observed in *Dole*, "[o]ur decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion' " such that there is no choice but to accept the program. *Accord Steward Machine Co.* v. *Davis*, 301 U.S. 548, 590. In this case, Congress's enactment of a new, onerous obligation after the Medicaid program had been integrated into the State's health care system for twenty years amounted to coercion. Indeed, had it not resolved the controversy on statutory grounds, a recent Fourth Circuit en banc decision likely would have struck an exercise of Congress's Spending Power as violative of the Tenth Amendment. *See Virginia v. Riley*, 106 F.3d 559 (4th Cir. Feb. 5, 1997) (en banc) ("impermissible coercion" might support Tenth Amendment challenge where federal government withholds an entire special education grant for state's failure to comply with single condition).

The federal government's imposition of illegal alien health costs on California resembles the congressional action found unconstitutional in *New York*. *See* 505 U.S. at 188; *see also Board of Natural Resources* v. *Brown*, 992 F.2d

937, 945 (9th Cir. 1993) (invalidating provisions of the Forest Resources Conservation and Shortage Relief Act based on the Tenth Amendment). As in *New York*, which required states to regulate the disposal of radioactive waste pursuant to Congress's directive, the federal government through OBRA 86 required the State, as a State, to amend its previously-enacted Medi-Cal program, the counterpart of the federal program, and to appropriate funds to provide emergency medical care to OBRA 86 aliens. Indeed, the 1986 OBRA amendments constitute an admission by Congress of the federal government's failure to protect this country's borders, requiring the State to pay out of its own budget emergency medical care for illegal aliens within its borders. Significantly, Congress did not leave it to the states to determine what constitutes "emergency medical services," but defined that term itself.[18] (App. E-77-78.)

That equitable relief should be available to Petitioners was acknowledged in 1982 by five members of this Court in *Plyler v. Doe*, as set forth above. Yet, fifteen years after that statement was made, the State of California continues to spend millions of dollars each year for expenses directly and solely attributable to the federal government's failure to prevent illegal immigration, a condition which California itself is powerless to alter. It is time for this Court to declare for the benefit of all concerned the responsibilities of the federal government to the State of California in the area of illegal immigration.

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[18] California seeks declaratory and injunctive relief that would require Respondents to perform their constitutional and statutory duties so that the torrent of illegal immigration into California will be reduced to a manageable trickle, if not cut off altogether. In addition, however, Petitioners seek monetary relief for Respondents' failure to reimburse the State for the costs of providing emergency medical care for illegal aliens.

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, PETE WILSON, Governor; JOE G. SANDOVAL, Secretary, Youth and Adult Correctional Agency; JAMES H. GOMEZ, Director, Department of Corrections; FRANCISCO J. ALARCON, Chief Deputy Director, Department of the Youth Authority; RUSSELL S. GOULD, Director of Finance, State of California; SANDRA SMOLEY, Secretary, Health and Welfare Agency, State of California; S. KIMBERLY BELSHE, Director of Health Services, State of California, *Plaintiffs-Appellants,* v. UNITED STATES OF AMERICA; JANET RENO, Attorney General; DORIS MEISSNER, Commissioner, Immigration and Naturalization Service, United States; ALICE RIVLIN,* Acting Director, Director, U.S. Office of Management and Budget, United States, *Defendants-Appellees.*	No. 95-55490 D.C. No. CV 94-0674-K OPINION

* Substituted for Leon Panetta, Director of Office Management and Budget.

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, Chief Judge, Presiding

Argued and Submitted
June 12, 1996 – San Francisco, California

Filed January 7, 1997

Before: Stephen Reinhardt and Cynthia Holcomb Hall, Circuit Judges, and Robert R. Merhige, Jr., Senior District Judge.**

Opinion by Judge Merhige

SUMMARY

Immigration/Litigation & Procedure

The court of appeals affirmed a judgment of the district court. The court held that a state's claims against the federal government based on the costs of coping with illegal aliens present nonjusticiable political questions.

In an action against appellee United States, appellant State of California alleged various statutory and constitutional claims based on the impact of federal immigration policy, particularly as it affected the State's fiscal burdens.

The complaint alleged that the federal government had violated its obligation under the Invasion Clause of Article IV, § 4 of the Constitution to protect the states

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** The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

from invasion; that federal immigration policy violated the Guarantee Clause of Article IV, § 4 by forcing the State to spend money it otherwise would not have been required to spend, thus depriving it of a republican form of government; that the federal government's coercive conditioning the receipt of Medicaid funds on the State's agreeing to provide emergency medical services to illegal aliens violated the Tenth Amendment; that the United States violated the Tenth Amendment because federal immigration policy caused the State to incur the costs of incarcerting illegal aliens who commit crimes within the State; and that the federal government violated the Tenth Amendment because the State had to allocate funds to pay for the public education of alien children.

California also sought declaratory and injunctive relief based on the Attorney General's alleged violation of federal law by not deciding to reimburse the State for the costs incurred in incarcerating illegal aliens, and by not enforcing national immigration laws and final deportation orders.

On the federal government's motion to dismiss, the district court ruled that California's complaint failed to allege a claim on which relief could be granted. As to the State's claims seeking federal funds, the court ruled that they were barred by the doctrine of sovereign immunity. California appealed.

[1] California's claim under the Invasion Clause presented a nonjusticiable political question. [2] Protection of the states from invasion implicates foreign policy concerns that have been constitutionally committed to the political branches. For the court of appeals to determine

that the United States has been invaded would have disregarded the constitutional duties that are the responsibilities of other branches of government, and would have resulted in the court making an ineffective nonjudicial policy decision. Even if the issue were within the court's constitutional responsibility, there were no manageable standards to ascertain whether or when an influx of illegal immigrants should be said to constitute an invasion. [3] Article IV, § 4 serves to protect a state from foreign hostility and ambitious or vindictive enterprises on the part of other states or foreign nations. It was not intended to be used as urged by California.

[4] Claims brought under the Guarantee Clause are traditionally nonjusticiable. California's claims under the Guarantee Clause raised nonjusticiable political questions. [5] Assuming that California presented a justiciable claim, there was nothing in the record other than a mere bare contention that the federal government's policies denied California a republican form of government.

[6] Under the Constitution, the federal government's conditioning of funds is permissible if (1) the spending is in furtherance of the general welfare; (2) Congress does so unambiguously to the end that states may knowingly exercise their choice to either accept or reject the funds; (3) the conditions imposed are reasonably related to the federal interest in the particular program; and (4) no other constitutional provision provides an independent bar to the conditional grant of federal funds. Congress' use of the spending power will be found impermissibly coercive, if ever, only in the most extraordinary circumstances. [7] No party challenging the conditioning of federal funds has *ever* succeeded under the

coercion theory. To the extent that there is any viability left in the coercion theory, it was not reflected in the facts.

[8] California reasoned that because the United States failed to effectively enforce its immigration policies, the federal government effectively "commandeered" the State's legislative process by forcing California to allocate money and human resources to incarcerate illegal alien felons and supervise their parole. [9] California failed to allege a Tenth Amendment violation because no federal mandate required California to pursue a penal policy resulting in those costs. [10] Because California's obligation to provide for the public education of alien children derived from an independent constitutional obligation and not federal immigration policy, the Tenth Amendment was not implicated. [11] California's Tenth Amendment claims also presented nonjusticiable political questions.

[12] The Attorney General's decision to allocate monies generally appropriated in a lump sum for the administration of immigration laws for the purpose of reimbursing a state for the cost of incarcerating illegal aliens is committed to agency discretion by law and is not subject to judicial review under the Administrative Procedure Act. Inasmuch as California sought a declaration that the Attorney General was authorized to allocate funds to the State to reimburse it for the costs of incarcerating illegal aliens, California sought an unconstitutional advisory opinion.

[13] Agency refusal to institute investigative or enforcement proceedings falls within the exception to reviewability for action committed to agency discretion.

An agency's decision not to prosecute or enforce is generally committed to its absolute discretion and is not subject to judicial review.

[14] Even if the State had asserted a justiciable claim seeking federal funds, such a claim would have been barred by the doctrine of sovereign immunity in the absence of Congress having explicitly waived such immunity. [15] The restitution or reimbursement sought was compensation for the monetary damage the State had suffered. The relief California sought was therefore barred by the Constitution.

COUNSEL

Floyd D. Shimomura, Assistant Attorney General, Linda A. Cabatic, Supervising Deputy Attorney General, Paul H. Dobson, Deputy Attorney General, Sacramento, California, for the plaintiffs-appellants.

Mark B. Stern, United States Department of Justice, Washington, D.C., for the defendants-appellees.

Louis F. Hubener, Assistant Attorney General, Office of the Attorney General, Tallahassee, Florida; Ian Fan, Deputy, San Diego, California; Daniel J. Popeo, David A. Price, Washington Legal Foundation, Washington, D.C., for the amici curiae.

OPINION

MERHIGE, Senior District Judge:

In this appeal, Plaintiffs-Appellants State of California[1] ("California") and state officials Governor Pete Wilson; Director of Finance, Russell S. Gould; Acting Secretary, Youth and Adult Correctional Agency, Joe G. Sandoval; Director of the Department of Corrections, James H. Gomez, Chief Deputy Director of the Department of the Youth Authority, Francisco J. Alarcon; Acting Secretary, Health and Welfare Agency, Sandra R. Smoley; and Director of the Department of Health Services, S. Kimberly Belshe (collectively, "California" or "the State") appeal from a judgment entered in the United States District Court for the Southern District of California granting the motion of the Defendants-Appellees United States of America and federal officials Attorney General Janet Reno ("Attorney General"); Acting Director of the Office of Management and Budget, Alice Rivlin; Commissioner, Immigration and Naturalization Service, Doris Meissner ("Commissioner of the INS"); Secretary of

[1] Both the State of California and the State of Arizona have sought redress from what each contends are violations of constitutional and statutory rights. The claims of each of these states were consolidated for argument. The Court heard the *California* action first, at counsels' request, followed immediately by argument from the State of Arizona. Although both Complaints contain similar prayers for relief, California's Complaint asserts additional claims than that of the State of Arizona. Accordingly, we resolve the California case in this opinion, and dispose of the Arizona case on the same grounds in an Order filed concurrently herewith.

Health and Human Services, Donna E. Shalala; Administrator, Health Care Financing Administration, Bruce C. Vladek; and Secretary of Education, Richard W. Riley to dismiss California's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).[2]

In its Complaint, California asserts various constitutional and statutory claims premised on the impact of federal immigration policy on the State, particularly as it affects the State's fiscal burdens. California seeks monetary damages as well as injunctive and declaratory relief under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Jurisdiction has been asserted pursuant to 28 U.S.C. §§ 1331, 1346, 1361, 2201 and 2202 against the United States and a number of its officials acting in their official capacities. The matter in controversy allegedly arises under the Constitution and laws of the United States. This Court has jurisdiction as well under 28 U.S.C.

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[2] A number of *amici curiae* have also filed briefs. Amongst these interested parties, all of whom support the Complaint filed by the Plaintiff-Appellants, are a number of United States and California legislators as well as The Washington Legal Foundation, The Allied Education Foundation and The California Correctional Peace Officers Association. The joint briefs of the aforementioned, for which the Court expresses its appreciation, have been considered in reaching the Court's conclusion.

It is also noted that the Amended Complaint added claims and two state public health officials as plaintiffs and the United States Secretary of Health and Human Services, the Administrator of the United States Health Care Financing Administration, and the United States Secretary of Education as defendants.

§ 1291. The immediate issue before the Court is the correctness of the trial court's dismissal of the Amended Complaint under Fed. R. Civ. P. 12(b)(6) for the failure to state a claim upon which relief can be granted. For the reasons stated below, the judgment of the district court is affirmed.

I.

This Court reviews *de novo* a grant of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Stone v. Travelers Corp.*, 58 F.3d 434, 436-37 (9th Cir. 1995). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hughes v. Rows*, 449 U.S. 5, 10 (1980) (citation omitted). When reviewing a district court's dismissal of a complaint for failure to state a claim, this Court must accept the facts alleged in the complaint as true. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 770 (1993).

In its Complaint, California asserts that the number of permanent illegal residents in California stands at 1.7 million – 5% of the state's population – and increases by approximately 125,000 a year. California further asserts that, in the fiscal year this action was initiated, it would spend nearly $2.4 billion in providing federally mandated education and health care benefits to illegal aliens and in incarcerating illegal aliens who commit crimes within the State.[3]

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[3] California contends that 5% of the State's population is made up of illegal immigrants, and estimates that it spends $395

California's Complaint consists of eight claims. In Count I of its Complaint, California asserts that the United States has violated its obligations to protect the State from invasion and to guarantee it a republican form of government under the Invasion and Guarantee Clauses of Article IV of the United States Constitution by failing to stop the intrusion of illegal aliens across the State's borders. U.S. Const. art. IV, § 4. In Counts II and IX, California asserts that the United States has violated the Guarantee Clause and the Tenth Amendment to the United States Constitution by requiring the State to fund emergency health care costs for illegal immigrants, by causing the State to incur the costs of incarcerating illegal immigrants, and by causing the State to incur the costs of providing public schooling to illegal immigrants. In Count III, California seeks a declaration that the Attorney General has violated 8 U.S.C. § 1365 because she has not decided to reimburse the State for the costs incurred in incarcerating illegal aliens out of monies available, but not specifically appropriated, for that purpose. Finally, in Counts V through VIII,[4] California seeks declarative and injunctive relief because the Attorney General and the Commissioner of the INS failed to perform their statutory duties under 8 U.S.C. §§ 1252(I), 1252(a)(2), 1326 and 1252(c) by not conducting deportation proceedings immediately following the conviction of aliens eligible for deportation; failing to take into custody aliens convicted

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million a year providing emergency health care for illegal aliens, another $390 million on incarceration and parole supervision of illegal aliens, as well as $1.5 billion educating illegal aliens.

[4] California's Complaint does not contain a Count IV.

of aggravated felonies upon their release from state incarceration pending determination of deportability; failing to prosecute deported aliens who illegally reenter the country; and by failing to effectively execute final orders of deportation and instead merely "dropp[ing] off" the deported aliens at the U.S.-Mexican border.

II.

A. Invasion Clause

[1] In Count I of its Complaint, California contends that the United States has violated its obligation under the Invasion Clause of Article IV, § 4 of the Constitution to protect the State from invasion.[5] California's claim under the Invasion Clause presents a nonjusticiable political question. In *Baker v. Carr,* the Supreme Court set forth the analysis that governs the political question doctrine. There, the Court stated:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for

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[5] The Invasion Clause states: "The United States . . . shall protect each of [the states] against Invasion." U.S. Const. art IV, § 4.

> resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962).

[2] In this case, the issue of protection of the States from invasion implicates foreign policy concerns which have been constitutionally committed to the political branches. The Supreme Court has held that the political branches have plenary powers over immigration. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). For this Court to determine that the United States has been "invaded" when the political branches have made no such determination would disregard the constitutional duties that are the specific responsibility of other branches of government, and would result in the Court making an ineffective nonjudicial policy decision. *See Barber v. Hawaii*, 42 F.3d 1185, 1199 (9th Cir. 1994) (dismissing an Invasion Clause claim as a nonjusticiable political question). Additionally, even if the issue were properly within the Court's constitutional responsibility, there are no manageable standards to ascertain whether or when an influx of illegal immigrants should be said to constitute an invasion. The Court notes that the other Circuits that have addressed the issues before us in similar suits against the United States have reached the same conclusions that we do. *Padavan v.*

United States, 82 F.3d 23, 28 (2nd Cir. 1996); *Chiles v. United States*, 69 F.3d 1094, 1097 (11th Cir. 1995), *cert. denied*, 116 S.Ct. 1674 (1996); *New Jersey v. United States*, 91 F.3d 463 (3rd Cir. 1996); *Texas v. United States*, No. B-94-228 (S.D. Tex. Aug. 7, 1995), *appeal pending*, No. 95-40721 (5th Cir).

[3] Moreover, California ignores the conclusion set forth by our Founders. In *The Federalist* No. 43, James Madison referred to the Invasion Clause as affording protection in situations wherein a state is exposed to armed hostility from another political entity. Madison stated that Article IV, § 4 serves to protect a state from "foreign hostility" and "ambitious or vindictive enterprises" on the part of other states or foreign nations. *The Federalist* No. 43 at 293 (Cooke ed.1961).[6] It was not intended to be used as urged by California.

B. Guarantee Clause

Counts I, II and IX of California's Complaint contend that federal immigration policy is violative of the Guarantee Clause of Article IV, § 4. The Guarantee Clause provides, "The United States shall guarantee to every State in this Union a Republican form of Government." U.S.Const. art. IV, § 4. California argues that federal immigration policy has forced it to spend money that it would otherwise not have been required to spend, thus depriving it of a republican form of government.

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[6] *See Debate From the Virginia Convention* (June 16, 1788), *reprinted in* 10 *The Documentary History of the Ratification of the Constitution* 1299, 1312 (Kaminsky & Saladins eds., 1993). *See also Padavan*, 82 F.3d at 28 (citing *The Federalist* No. 43).

[4] Supreme Court decisions have traditionally found that claims brought under the Guarantee Clause are nonjusticiable. *See New York v. United States*, 505 U.S. 144, 183-85 (1992) (citing cases).[7] California's claims under the Guarantee Clause in Counts I, II, and IX raise nonjusticiable political questions. *See Padavan*, 82 F.3d at 28-29 (reaching the same result); *Chiles*, 69 F.3d at 1097 (reaching same result); *New Jersey*, 91 F.3d at 470.

[5] Moreover, assuming, *arguendo*, that California has presented a justiciable claim, there is nothing in this record other than a mere bare contention that the federal government's policies deny California a republican form of government. The motion to dismiss was therefore properly granted.

C. Tenth Amendment

California's Tenth Amendment claims in Counts II and IX focus on three areas where it is asserted that the State is unconstitutionally being required by the United States to spend funds or where it is asserted that the United States has "commandeered" the state legislative process.[8] In all three instances, California has failed to state a claim under the Tenth Amendment.

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[7] As Justice O'Connor for an unanimous court in *New York v. United States* stated, in most cases in which the Court has been asked to apply the clause, the Court has found the claims to be nonjusticiable under the "political question" doctrine. *New York*, 505 U.S. at 184. (citations omitted).

[8] The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people." U.S. Const. amend. X.

1. *Medicaid*

[6] California contends that the Federal Government's conditioning the receipt of Medicaid funds on the State's agreeing to provide emergency medical services to illegal aliens violates the Tenth Amendment. Under the Constitution, the Federal Government's conditioning of funds is permissible if (1) the spending, as in this case, is in furtherance of the general welfare; (2) Congress does so unambiguously to the end that states may knowingly exercise their choice to either accept or reject the funds; (3) the conditions imposed are reasonably related to the federal interest in the particular program; (4) no other constitutional provision "provide[s] an independent bar to the conditional grant of federal funds." *South Dakota v. Dole*, 483 U.S. 203 at 207-08 (1987). California does not contend that Congress violated any of the aforementioned conditions; instead it argues that while its choice to participate in Medicaid may have been voluntary,[9] it now has no choice but to remain in the program in order to prevent a collapse of its medical system. It contends as well that the determination of when the moment of coercion has been reached is one of fact which cannot be decided via a motion to dismiss. California attempts to support this contention by reference to *South Dakota v. Dole*, 483 U.S. 203 (1987), where the Court wrote, "[o]ur decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into

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[9] The Supreme Court has noted that participation in the Medicaid scheme is voluntary, *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990).

compulsion.' " *Id.* at 211 (citation omitted). The *Dole* court concluded, however, that it would only find Congress' use of its spending power impermissibly coercive, if ever, in the most extraordinary circumstances. *Dole*, 483 U.S. at 210-11.

[7] The response to that contention long preceded this case when this Court responded to similar contentions by the State of Nevada in reference to the federal government's conditioning the receipt of highway funds on the acceptance of the national speed limit. In that case, Nevada contended that the threatened loss of ninety-five percent of its highway funds deprived it of any realistic choice as to whether to reject the uniform national limit. *Nevada v. Skinner*, 884 F.2d 445 at 448-49 (9th Cir. 1989). In refusing the relief sought, the Court noted that no party challenging the conditioning of federal funds has ever succeeded under the coercion theory. *Id.* at 448 (citing *Oklahoma v. Schweiker*, 655 F.2d 401, (D.C. Cir. 1981)). This court went on to state:

> [C]an a sovereign state which is always free to increase its tax revenues ever be coerced by the withholding of federal funds-or is the state merely presented with hard political choices? The difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments.

Id. at 448 (footnotes omitted). The Court finds that to the extent that there is any viability left in the coercion theory, it is not reflected in the facts of this record. *See Padavan*, 82 F.3d at 28-29 (reaching same result); *New*

Jersey, 91 F.3d at 466-67 (3d Cir. 1996) (reaching same result).[10]

2. *Prisons*

[8] California also contends in Count IX that the United States has violated the Tenth Amendment because federal immigration policy causes the State to incur the costs of incarcerating those illegal aliens who commit crimes within the State. California reasons that because the United States has failed to effectively enforce its immigration policies, the Federal Government has essentially "commandeered" the State's legislative process by forcing California to allocate money and human resources to both incarcerate illegal alien felons and supervise their parole.

[9] The Court concludes that California has failed to allege a Tenth Amendment violation because no federal mandate requires California to pursue a penal policy resulting in these costs. *See Padavan*, 82 F.3d at 28-29 (reaching same result); *New Jersey*, 91 F.3d at 467 (reaching same result).

3. *Public Schools*

[10] Finally, California argues that the Federal Government has violated the Tenth Amendment because the

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[10] As to the argument that the issue was improperly decided at the motion to dismiss stage, the Eighth Circuit, in a decision affirmed by the Supreme Court, approved of the trial court's dismissal at this stage. *South Dakota v. Dole*, 791, 634 (8th Cir. 1986), *aff'd*, 483 U.S. 203 (1987).

State must allocate funds to pay for the public education of alien children. We note that this argument is merely a variation of California's claim that the Tenth Amendment is violated when it expends funds to incarcerate illegal aliens. Again, California contends that the costs of educating alien children stems from the Federal Government's ineffective policing of national borders. We find California's argument unpersuasive. Because the State's obligation to provide this education derives from an independent constitutional obligation and not federal immigration policy, *see Plyler v. Doe*, 457 U.S. 202, 230 (1982), the Tenth Amendment is not implicated. *See Padavan* 82 F.3d at 29 (reaching same result); *New Jersey*, 91 F.3d at 467 (reaching same result).

4. ***Failure to State a Claim***

[11] In each instance discussed above, the trial court properly dismissed California's claims because California failed to allege a viable Tenth Amendment violation. In addition to the foregoing, however, taking the facts in reference to immigration as accurate, as we must in considering a motion under Rule 12(b)(6), inevitably leads this Court to the conclusion that California's Tenth Amendment claims also present nonjusticiable political questions. The concerns expressed by California are unquestionably beyond the authority of the judicial branch.

D. Statutory Claims

1. *Reimbursement for Costs of Incarceration*

Under 8 U.S.C. § 1365, the Attorney General is authorized to reimburse states for the cost of incarcerating illegal aliens convicted of state crimes. Section 1365, however, does not appropriate any funds and is made "[s]ubject to the amounts provided in advance in appropriation Acts." 8 U.S.C. § 1365(a).[11]

In Count III, California seeks a declaration that the Attorney General has violated § 1365 because she has not decided to reimburse the State for the costs incurred in incarcerating illegal aliens out of monies available, but not specifically appropriated, for that purpose. While the record reflects that no "amounts have been provided in advance," California urges that 8 U.S.C. § 1365 authorizes the Attorney General to allocate generally appropriated INS funds to this specific purpose.[12]

[12] Assuming, without deciding, that California has correctly interpreted § 1365, the Attorney General's decision to allocate monies generally appropriated to her in a lump-sum for the administration of immigration laws

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[11] Title 8 U.S.C. § 1365(a) provides: "Subject to the amounts provided in advance in appropriation Acts, the Attorney General shall reimburse a State for the costs incurred by the State for the imprisonment of any illegal alien or Cuban national who is convicted of a felony by such State." 8 U.S.C. § 1365(a).

[12] California notes that the Attorney General can draw upon a lump-sum appropriation of $1,048,538,000 for INS salaries and expense as well as on increased fines and forfeitures authorized by 8 U.S.C. § 1330.

for the specific purpose of reimbursing a State for the costs of incarcerating illegal aliens under 8 U.S.C. § 1365 is "committed to agency discretion by law" and is not subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2). *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) ("The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion."). Inasmuch as California may be seeking in Count III a further declaration that the Attorney General is authorized to allocate funds to the State to reimburse it for the costs of incarcerating illegal aliens, California seeks an unconstitutional advisory opinion. *See Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1509 (9th Cir. 1994) ("A federal court has no jurisdiction to hear a case that cannot affect the litigants' rights.").

2. *Immigration Laws*

California has also brought several other statutory claims alleging that the Attorney General has failed to adequately fulfill her obligation to enforce the country's immigration laws, in particular, 8 U.S.C. §§ 1252(I); 1252(a)(2)(A); 1326; and 1252(c). Title 8 U.S.C. § 1252(I) provides that "[i]n the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of conviction." 8 U.S.C. § 1252(I). In Count VI, California seeks a declaration and injunctive relief on the basis that the Attorney General and the Commissioner of the INS have violated § 1252(I) by adopting a policy of not commencing deportation proceedings until shortly before

convicted illegal aliens are to be released from confinement.

Title 8 U.S.C. § 1252(a)(2)(A) provides that the Attorney General "shall take into custody any alien convicted of an aggravated felony upon release of the alien [from state custody or supervision]." 8 U.S.C. § 1252(a)(2)(A). In Count VI, California seeks a declaration and injunctive relief on the basis that the Attorney General and the Commissioner of the INS violated the terms of this section by failing to take into custody aliens convicted of aggravated felonies upon their release from state incarceration pending determination of deportability.

Title 8 U.S.C. § 1326 provides that a person who enters the country illegally after being deported is guilty of a crime. In Count VII, California seeks equitable relief on the basis that the Attorney General has violated this section by prosecuting deported aliens who illegally reenter the country only in cases where the aliens are serious repeat offenders.

[13] With respect to sections 1252(I), 1252(a)(2)(A) and 1326, the Court cannot, with propriety, address the issues raised. In *Heckler v. Chaney*, 470 U.S. 821, 838 (1985) the Supreme Court held that "agency refusals to institute investigative or enforcement proceedings" fall within the "exception to reviewability provided by [5 U.S.C.] § 701(a)(2) for action 'committed to agency discretion.' " Each of the claims asserted by California under these statutes implicates the institution of enforcement actions of the variety contemplated in *Heckler*. As the Court noted in *Heckler*, "[a]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a

decision generally committed to an agency's absolute discretion." 470 U.S. at 831. Accordingly, these issues, having been committed to agency discretion, are not subject to judicial review. While the Supreme Court in *Heckler* did state in a footnote that a non-enforcement decision might be reviewable where "the agency has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities", *Heckler,* 470 U.S. at 833 n.4, the allegations asserted in the instant Complaint do not rise to a level that would indicate such an abdication.

Finally, California seeks declaratory and injunctive relief in Count VIII in the form of a declaration that the Attorney General and Commissioner of the INS have failed to effectively execute final orders of deportation pursuant to 8 U.S.C. § 1252(c). In particular, the State seeks a declaration that the Attorney General has a duty to adopt policies for the administration of § 1252(c) that are consistent with the ruling of this Court. The State seeks as well to enjoin the Attorney General from continuing to implement a policy that allows "drop off" border deportation for cost transfer and cost saving purposes.

Section 1252(c) provides that "the Attorney General shall have a period of six months" following a final order of deportation "to effect the alien's departure from the United States." 8 U.S.C. § 1252(c). The statute does not define "departure" or otherwise specify any method of effecting deportation.

Because the Attorney General and the Commissioner of the INS reasonably interpret the statute in determining

that delivery of an alien to the border "effect[s] the alien's departure from the United States," the Court defers to that interpretation. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44, (1984). For the reasons previously stated concerning agency discretion and the Court's lack of authority to review agency actions as discussed in *Heckler*, California has failed to state a claim in Count VIII.

III.

Sovereign Immunity

[14] California contends that the trial court erred in dismissing Counts I, II, III and IX on the alternative grounds that suits against the United States are barred by sovereign immunity to the extent that monetary awards are sought. We agree that even if the State had asserted a justiciable claim seeking federal funds, such a claim would be barred by the doctrine of sovereign immunity in the absence of Congress having explicitly waived such immunity. *See Bloch v. North Dakota*, 461 U.S. 273, 280 (1983) ("The States of the Union, like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress.").

California contends that it seeks "reimbursement" and/or "restitution" as distinguished from "money damages." The State premises its argument on the waiver of sovereign immunity contained in 5 U.S.C. § 702 which states in pertinent part:

> An action in a court of the United States seeking relief other than money damages and stating a

> claim that an agency or officer or employee thereof acted or failed to act in an official capacity under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702.

[15] While reliance on 5 U.S.C. § 702 is not well taken because the statute specifically exempts "money damages," regardless of its terminology, the "restitution" or "reimbursement" sought is monetary compensation for the monetary damage each state has suffered. The relief California seeks is therefore barred by the Constitution.

IV.

The Court having concluded that all of the claims asserted by the State of California were properly dismissed, the judgment of the district court is **AFFIRMED**.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
WESTERN REGION

STATE OF CALIFORNIA, et al., Plaintiffs, vs. UNITED STATES OF AMERICA, et al., Defendants.	Case No. 94-0674-K(CM) San Diego, California Monday, February 13, 1995

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JUDITH N. KEEP
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

* * *

[p. 56] Article 1, Section 8 – actually, the – ironically, the clause in full is "to establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States . . . " – it's all in the same clause.

I'm going to go ahead and rule for you and I appreciate very much not only the depth of your preparation for the oral argument this morning but in the papers. These are very difficult issues.

Before I rule on the issues presented, I want to make a few preliminary comments. The issues before me are legal issues and in many respects they are very technical. For example, the issues of sovereign immunity, standing, original intent, and whether the lawsuit presents justiciable controversies.

I am aware, however, that there are many issues involving the border that are not technical. They are fundamental, sensitive, and far reaching. From reading all of the papers, I have had glimpses of some of these other more troubling concerns. For example, the State of California does have valid concerns about the financial drain caused by an issue over which it has no jurisdiction; that is, the control of the border.

The Federal Government, legitimately, is concerned about courts and states second-guessing policy development on [p. 57] the federal level and must develop its

policies about the border with sensitivity to international issues as well as national issues as well as to state issues.

The countries affected by our borders policy, and particularly here – Mexico – are legitimately concerned. It is difficult to maintain the fragile balance required between protecting our territorial integrity and developing our mutual economic and social interdependence.

Sadly, issues that touch on borders are readily construed as xenophobic even when they are not.

Finally and perhaps most importantly, affected and caring individuals on both sides of the border are concerned that racism is driving this lawsuit as well as Proposition 187.

And I do feel that I should comment on that, even though it has nothing to do with this lawsuit, and I am being conscious of the fact I should not give advisory opinions.

The United States is a country that has striven mightily to confront racism and to deal with it. In many respects, when I was reading your papers this weekend and thinking about this issue, I personally think that the most magnificent contribution this country has made to the world is its steadfast yet agonizing effort to strike racism head on and to try to eliminate it.

This effort, and particularly that of the last 25 [p. 58] years, has always been painful, has often been gut-wrenching, but it has been overall remarkably successful. But because the rules of racism are relatively fresh, it's perhaps logical that people will construe motives for lawsuits such as this as racist rather than financial.

In essence, from reading your papers, it's clear to me that financial constraints and social tensions are fuel for misunderstandings. I note all of this because I appreciate the complex backdrop of this lawsuit and I also acknowledge that this lawsuit will not meaningfully air those issues nor grapple with them. Those issues are in other fora and the Executive and Legislative branches will continue to struggle with them. My jurisdiction today is very limited and, as indicated at the beginning of this ruling, I will be dealing with very technical matters, and I now turn to them.

Basically, the United States is moving to dismiss the State of California's complaint pursuant to Civil Procedure 12(b)(6) for failure to state a claim. The Plaintiff opposes.

This case arises from the political controversy over illegal immigration to the United States. In these pleadings, it is undisputed that a large number of illegal aliens in the United States located in California and that California has had to bear a particularly heavy burden in dealing with illegal immigration.

[p. 59] On April 29th, 1994, the State of California, its Governor, Governor Wilson, and various other State officials, filed a complaint in this court for a judicial determination of how to allocate the costs of illegal immigration between the California State Government and the Federal Government.

On September 22nd, Plaintiffs filed an amended complaint.

Defendants contend that the case raises political questions rather than justiciable controversies and move to dismiss. The standard for motions to dismiss is governed by Rule 12(b)(6), which I incorporate by reference.

> "The complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his or her claim for relief." *Church of Scientology v. Flynn*, 744 F.2d 694, 696. "In applying this standard, the court must treat all of plaintiff's allegations as true." *Experimental Engineering, Inc. v. United Technologies Corp.*, 614 F.2d 1244-45.
>
> "And to dismiss with prejudice, it must appear to a certainty that plaintiff would not be entitled to relief under any set of facts that could be proven." *Reddy v. Litton Industries*, 912 F.2d 291-93, *cert. denied*.

[p. 60] Standing. Defendants argue first that Plaintiffs have no standing to pursue their non-statutory claims. Plaintiffs bear the burden of establishing their standing and must show that they suffered actual injury, there was a causal connection between this injury and Defendants' purported action or inaction, and that the relief sought will likely redress the injury. *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136.

Defendants argue that Plaintiffs failed to satisfy the second prong because under no set of facts could they establish that the Federal Government's actions are the cause of California's injuries where these injuries are the costs associated with the presence of illegal aliens in the state.

Defendants assert instead that the illegal emigrants' [sic] actions are the cause of California's injuries.

Plaintiffs argue that Defendants' failure to perform various statutory and constitutional duties has resulted in an influx of illegal aliens or at least an influx of additional illegal aliens who would not have entered California but for the Federal Government's failure to uphold its own laws.

The supreme Court noted in *Lujan* that when plaintiff's asserted injury arises from the Government's allegedly unlawful regulation, or lack of regulation, of a third party, causation or redressability ordinarily hinge on [p. 61] the response of the regulated or regulable third party to the Government action or inaction and perhaps on the response of others as well. *Lujan* at 2137.

At the summary judgment stage, Plaintiffs bear a heavy burden to show causation under the standard. *Id.* However, on a motion to dismiss, I must presume that general allegations embrace those specific facts that are necessary to support the claim. *Id.*

In addition, I cannot dismiss Plaintiffs' claims with prejudice for lack of standing unless it appears to a certainty that Plaintiff would not be entitled to relief under any set of facts that could be proven regarding causation. *Reddy v. Litton Industries,* 912 F.2d 291, 293.

Given the presumption in favor of Plaintiffs on a motion to dismiss and considering all the papers and pleadings that have been submitted for this hearing, I cannot say at this stage that Plaintiffs could prove no set of facts showing causation.

Therefore, I deny Defendants' motion to dismiss as it relies on standing.

Plaintiffs' claims. First, the invasion of illegal emigrants [sic]. Plaintiffs argue first that Defendants have permitted an invasion of illegal emigrants [sic] into the State of California, asserting that Defendants have thereby violated Article IV, Section 4 of the Constitution which requires the [p. 62] United States Government to protect each of the States against invasion and to guarantee to every state in this union a Republican form of government.

Plaintiffs then ask this Court to enjoin the Federal Government from enforcing any federal law that impedes California from determining the presence of illegal immigrants, to order the Federal Government to pay equitable reimbursement of the costs California has borne for legally mandated health care, education, and incarceration of illegal aliens.

Although Plaintiffs rely on the term "invasion is created," I find that this theory ultimately is unpersuasive. Plaintiff argues for a very broad interpretation of the word "invasion," citing *Johnson's Dictionary of the English Language*, a reference book from 1755 commonly referred to by constitutional scholars to shed light on the founders' terminology.

I am unconvinced by Plaintiffs' analysis. As Defendants note, *Johnson's* first definition of the word "invade" is to attack a country, to make a hostile entrance. The fact that the secondary definition of "invasion" also includes the term "hostile encroachments" I find does not support Plaintiffs' theory and suggests that the founders meant

the word "hostile" to apply in this situation. Logically, the word "hostile" in the term "hostile [p. 63] encroachment" looks at the mental state of the one encroaching and not to the effect on the state that was encroached upon.

And basically what the State of California is arguing is that it's had a bad effect on us and that, therefore, makes it a hostile encroachment. But certainly I think if you look at the intent of those coming in, it's not to be hostile, generally speaking. It's to come here to try to improve their lot economically.

Indeed, in context, the founders' use of the term "invade" implicates foremost the military aspects of the word as in Article I, Section 8, Clause 15 of the Constitution, which empowers Congress to call forth the militia to execute the laws of the Union, suppress insurrections, and repeal invasions.

Plaintiffs' interpretation of James Madison's commentary on the "invasion" clause I also hold is unpersuasive. In the Federalist Number 43, Madison stated:

> "A protection against invasion is due from society to the parts composing it. The latitude of the expression here used seems to secure each state not only against foreign hostility but against ambitious or vindictive enterprises of its more powerful neighbors."

Plaintiffs' interpretation of this quote to mean [p. 64] that the invasion clause covers not only foreign hostility but also mass immigration, and I find that that just does not bear close scrutiny. Instead, on its face and in the context of the Federalist Number 43, Madison's quote

clearly asserts that the invasion clause protects states against not only military invasion by foreign powers but also invasion by other states in the union that prove to be belligerent neighbors.

Indeed, if Arizona and Nevada were to gang up upon California and invade, this clause could in fact be invoked.

Finally, Plaintiffs' citation to the *Chinese Exclusion* case, 130 U.S. 581 at 606 fails to strengthen their argument. In the *Chinese Exclusion* case, the Supreme Court held that:

> "To preserve its independence and give security against foreign aggression or encroachment is the highest duty of every nation. It matters not in what form such aggression and encroachment come, whether from a foreign nation acting in its national character or from vast words of its people crowding in upon it." 130 U.S. at 606. This case held that:
>
> "Congress has the judicially unreviewable power to decide the nation's immigration policy."

Also, Plaintiffs rely on an Oregon District Court [p. 65] case from 1886, *In re Empaneling and Instructing the Grand Jury*, 26 Fed. 749, which similarly held that:

> "The United States has the same right to prevent an immigration within its boundaries of persons that it deems objectionable as it would have to repel an armed invasion."

Basically, both of these cases hold that the United States has the right to control immigration, and there is really no dispute or that involved in this lawsuit. The

problem is that interpreting the migration of persons from Mexico into the United States as an invasion that allows enjoining federal law or obtaining reimbursement from the Federal Treasury does not necessarily follow from the right of the Federal Government to in fact regulate its immigration policy.

And that's the point that I was getting at with the discussion of you about duty because I found that that word was used interchangeably in the State's papers, but there has frankly been no case cited nor any statute cited whereby Congress delegated to the Attorney General and various government agencies a duty that could be enforced in a lawsuit such as this.

I also note that the cases cited do not hold that the invasion clause creates an enforceable or justiciable right on the part of states to be free from illegal aliens. [p. 66] Rather, these cases hold that the Government, Federal Government, has plenty of decision-making power over the exclusion of certain classes of immigrants and that exclusion legislation implicates the political question doctrine.

Second, even if I interpreted the *Chinese Exclusion* case as holding that the invasion clause encompasses immigrant invasion, which I do not, I find the rest of Justice Fields' opinion, I find that immigrant exclusion and the strategy for waging a war against an immigrant invasion is a non-justiciable, political question solely in the hands of Congress and the Executive branch.

Under the political question doctrine:

> "A controversy is non-justiciable where there is a textually demonstrable constitutional commitment of the issue to a coordinant political department or a lack of judicially discoverable and manageable standards for resolving it." *Nixon v. United States,* 113 S.Ct. 732-33.

In the realm of immigration, the Supreme Court has stated that:

> "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo v. Bell,* 430 U.S. 787, 792.

In addition, there is simply no judicially [p. 67] manageable standard to determine at what point a migration becomes an invasion under Article IV. Similarly, there is no judicially manageable standard to measure whether the Federal Government's failure to prevent an illegal immigrant invasion has resulted in the violation of the guarantee clause of Article IV under which the United States must guarantee that each state will have a Republican form of government. *Baker v. Carr,* 369 U.S. 186, 223, holding the guarantee clause is not a repository of judicially manageable standards.

Finally, in order to grant equitable reimbursement of California's illegal alien costs, this court would be forced to review the United States' overall enforcement of the federal immigration laws to determine what the Federal Government's budget allocations and enforcement measures should have been to achieve effective enforcement of the laws.

As District Judge Davis held on December 20th, 1994 in Florida Governor Lawton Chiles' similar lawsuit:

> "The court is unable to identify criteria for making these decisions. This is clearly beyond the Judiciary's authority."

In our check-and-balance system of government, I hold that policy determinations of this nature should be left to the Legislative and Executive branches of government.

Reimbursement for the cost of providing emergency [p. 68] Medicaid to illegal aliens. Plaintiffs next argue that the federal Medicaid program violates Article IV and the Tenth Amendment by requiring participating states to provide emergency medical services to illegal aliens as a condition of receiving federal funding.

Plaintiffs assert that this condition is an unconstitutional encroachment on state sovereignty and is prohibited by the Tenth Amendment, the guarantee clause, and *New York v. United States*, 112 S.Ct. 2408, 2420, which held that:

> "Congress may not simply commandeer the legislative process of the states by directly compelling them to enact and enforce a federal regulatory program."

Plaintiffs seek a declaratory judgment that the federal Medicaid statute is unconstitutional because it requires states to pay 50 percent of the cost of emergency Medicaid for illegal aliens; two, a declaratory judgment that the Medicaid appropriations to Defendant's Health & Human Services Secretary are unavailable for reimbursement of states for their medical – excuse me – for their

emergency Medicaid costs; and, three, an injunction requiring the Defendants to reimburse 100 percent of California's costs.

I find the arguments are unpersuasive. As Defendants correctly note, the Tenth Amendment does not allow [p. 69] Congress to commandeer the states but does allow Congress to attach conditions on the receipt of federal funds so long as those conditions bear some relationship to the federal interest in the particular program. *South Dakota v. Dole*, 483 U.S. 203, 206.

While these conditions no doubt affect state legislatures' policies and choices, valid conditions do not violate the Tenth Amendment. *New York v. United States*, 112 S.Ct. 2423.

In addition, the guarantee clause is not violated where, as here, California's Republican form of government can vote to terminate its participation in the federal Medicaid program, a voluntary program.

Plaintiff argued that 30 years after entering the Medicaid program, California has become so dependent on federal Medicaid and has so integrated the federal funding into its own health care delivery system that it cannot realistically pull out of the program and is thus coerced by new federal conditions on funding.

To Plaintiffs, the voluntary condition has thus become a course of manner. I do, as indicated to you during our oral discussion, find this argument ironic as I do believe that this is the same cry raised by any persons on entitlement, including today most recently the welfare mothers. And while at first blush this argument had some

[p. 70] intuitive attractiveness from a legal standpoint, "To hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determination by which choice becomes impossible. Till now, the law has been guided by a robust common sense which assumes the freedom of the well is a working hypothesis in the solution of its problems." *Dole*, 483 U.S. at 211.

Further, there was clearly a point when California did have a choice and it chose the funds. To say that because it's become dependent over them at – over a period of time and therefore the Federal Government can no longer modify the conditions, change the conditions, or eliminate – actually, carry to its extreme – they would say that the Federal Government couldn't even eliminate its allocation of Medicare funds because the states are dependent – there's no law that's been cited to support that and, as *Dole* says, we just assume that there is an acceptance of – we have to guide this issue by a robust common sense.

Thus, I find the Medicaid program is not coercive for purposes of the Tenth Amendment or the guarantee clause.

Finally, as Defendants correctly point out, if I were to analyze whether California's legislature had been overcome by federal coercion, I would reject the argument on the merits. Plaintiffs' acceptance of the Federal [p. 71] Government's $30 billion Medicaid grant is conditioned on California spending $1.7 billion for emergency Medicaid to illegal aliens.

In the *Dole* case, where there was a similar ratio between the federal grant and the attendant condition, the Supreme Court found no coercion against the state.

Hence, for all of these reasons, Plaintiffs I hold have failed to state a cause of action on the Medicare claim and I grant the motion to dismiss on this claim.

Reimbursement for incarcerating illegal aliens who commit state felonies.

In their third claim, Plaintiffs seek declaratory relief. Plaintiffs' claim revolves around 8 USC 1365 which authorizes the U.S. Attorney General to reimburse California for the costs the State incurs to incarcerate illegal aliens who are convicted for – of state criminal offenses.

Under the terms of 1365, the federal reimbursement is subject to the amounts provided in advance to the Attorney General in appropriation acts. In August '94, Congress appropriated $130 million to the Attorney General to reimburse states for incarceration costs.

However, as of the date Plaintiffs filed their amended complaint, distribution of the reimbursement had not yet occurred primarily because the Attorney General had not yet settled on a distribution formula.

[p. 72] Plaintiffs seek a declaratory judgment that the Attorney General is empowered to use other appropriated funds to satisfy her state reimbursement obligations. Specifically, they argue the Attorney General can and should use money appropriated to her through P.L. 103-121 to reimburse the states. P.L. 103-121 appropriation is a lump sum appropriation in the amount of $1,048,538,000 for salaries and expenses connected with

INS, Immigration and Naturalization, and alien registration services.

Plaintiffs also argue that the proceeds from the increased fines and forfeitures are authorized by 8 USC 1330 to support activities enhancing the enforcement of the immigration laws can and should be used to reimburse the states.

Defendants argue that only the appropriations specifically earmarked for the state reimbursement can be used for that purpose.

Defendants also contend that their decisions on how to use the lump sum appropriations are committed entirely to agency discretion and are not subject to judicial review.

I agree with Defendants' later point. The Supreme Court has made it clear that a lump sum appropriation is meant to give an agency the capacity to adopt a change in circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way.

[p. 73] Defendants' decision about the allocation of their lump sum appropriation are beyond judicial review and I, therefore, cannot grant Plaintiffs the relief they seek under any set of facts pleaded.

Plaintiffs argue in their complaint in opposition the Attorney General has stated that she does not have the discretion to use her lump sum appropriations to reimburse the states. Plaintiffs disagree and request a judicial construction of 1365, declaring that the Attorney General does have that discretion.

Well, the problem again that I see is because lump sum appropriations are beyond judicial review, frankly, it would be a pure advisory opinion and, therefore, that is not appropriate under the law and I decline to do so.

Also, since Plaintiffs' complaint does go much farther and requests that I order the Attorney General to exercise her discretion in conformity with the declaration and enjoin the Attorney General from implementing any policy that limits the exercise of discretion to expend the appropriations for State reimbursement purposes, I also find that goes very far from – from the point upon which I might have any type of jurisdiction.

I cannot grant such relief, as I do not have the power to order the Attorney General to act in a manner over which she has.unreviewable discretion. Hence, I dismiss the [p. 74] third claim.

I note that commencing on paragraph 188 of Plaintiffs' complaint, Plaintiffs also appear to assert a claim for reimbursement based on the Tenth Amendment and guarantee clause. I find that the Tenth Amendment is not implicated under this claim because the cost of incarcerating illegal aliens stems not from federal law but from the State's obligation to enforce its own law and its prosecution of illegal aliens for state criminal offenses.

I also find that even if the guarantee clause presented a justiciable issue here, it is not implicated because the Republican form of California's government has not been eliminated.

Clearly, the encroachment, if there be any, has not affected the California form of government. Maybe the

gridlock is caused by an equal number of Republicans and Democrats in the Assembly, but that's not caused by any notions of encroachment over which this lawsuit has been filed. So 1 dismiss the third claim.

Injunctive relief from the failure to promptly report – deport illegal aliens prior to their release from criminal incarceration, claim five. There is no claim four in this amended complaint.

This fifth claim alleges that Defendants are violating 8 USC 1252(i) by failing to deport incarcerated [p. 75] illegal aliens as expeditiously as possible after the date of the conviction, as required by statute.

Plaintiffs also allege that Defendants are violating 8 USC 1252(a)(d) which requires that deportation proceedings for aliens of aggravated felonies be completed prior to expiration of the alien sentence to the extent possible.

Plaintiffs assert that Defendants consistently wait until the alien's sentence is nearly over before initiating deportation proceedings, often causing the State to keep the alien in custody even after expiration of his sentence but pending his deportation hearing. Defendants contend that nothing in the statute requires deportation proceedings be concluded prior to release.

Although there are a lot of interesting arguments, particularly about recent Ninth Circuit cases, Defendants point out that on October 25th, 1994, Congress made it clear that 1252(i) is simply a directive to the Attorney General and not a judicially enforceable right. The Immigration and Nationality Technical Corrections Act of

1994, Section 225, Public Law 103-416, provides that nothing in 1252(i) shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

[p. 76] Hence, for these reasons, I grant the motion to dismiss the fifth claim.

Claim six, declaratory or injunctive relief for the failure to take into custody any alien convicted of an aggravated felony upon release of the alien.

From the papers, from the oral argument, and from the sections that were cited here, as well as the sections that I found that were cited that I was referring to, clearly the Attorney General has discretion. And because the Attorney General has discretion, I cannot issue declaratory and injunctive relief and therefore dismiss claim six.

Declaratory and injunctive relief for Defendants' failure to prosecute repeat border crossing offenders. The seventh claim alleges that the Attorney General has abdicated her duty under 8 USC 1326 to prosecute aliens who engage in repeat illegal border crossings. Plaintiffs allege that the Attorney General has adopted a limited enforcement policy where only serious repeat offenders are prosecuted.

Plaintiffs claim that their limited enforcement policy causes the State to absorb the costs of dealing with illegal aliens and they seek a declaratory judgment the Attorney General has a duty to prosecute under 1326 and a duty not to abdicate the costs of its immigration policy to the state and an order mandating the Attorney General to

exercise her discretion in a manner consistent with the [p. 77] declaratory judgment.

Defendants state that Plaintiffs' claim would require the Court to determine the Executive branch's law enforcement priorities and would encroach on the Attorney General's prosecutorial discretion.

I agree. The Supreme Court held in *Heckler v. Chaney*, 470 U.S. 821, 832, that:

> "An agency's decision not to take enforcement action should be presumed immune from judicial review."

Plaintiffs contend their allegations state a claim under one of the many exceptions suggested by *Chaney* and really adopted by the Ninth Circuit in *Montana Air*, 898 F.2d 753, 756, under which "an agency's decision is reviewable if the agency has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory duties."

However, even according to Plaintiffs' own pleadings, Defendants are enforcing 1326, albeit in a consciously limited fashion.

> "Discretionary limited enforcement does not amount to the kind of refusal to exercise the functions assigned to an agency or disclaimer of jurisdiction that must be found to overcome the presumption that prosecutorial discretion is [p. 78] unreviewable." *Montana Air* at 756.

"Rather, the Attorney General's policy-based decision to limit enforcement is a classic example of valid prosecutorial discretion."

Therefore, I grant the motion to dismiss.

Claim seven.

Claim eight. Plaintiffs allege Defendants' repatriation policy violates their deportation duties under 8 USC 1252(c), the Tenth Amendment, and the guarantee clause. Specifically, Plaintiffs complain that Defendants only escort illegal aliens to the border rather than sending them to their destination in Mexico, and this policy is so ineffective it does not constitute deportation under the law.

Plaintiffs thus request a declaratory judgment the Attorney General must execute her duties under 1252(c) in a manner that does not abdicate to the state the costs of Defendants' immigration policy, an order mandating the Attorney General to administer 1252 in accordance with the court's statutory construction, and an injunction against the current border dropoff deportation procedure.

I do not agree with Defendants' contention this is an unjusticiable political question. Plaintiffs correctly point out that interior repatriation does not necessarily raise the foreign policy ramification because deportees need not be escorted to the interior. They need only be sent [p. 79] there – although I guess that's assuming it would be a one-way ticket with no stops in between.

I do not find that as a legal matter nothing in the text of 1252 prohibits the Attorney General from utilizing the

deportation procedures currently enforced even if Plaintiffs would prefer that other procedures are instituted.

In addition, under reasoning similar to my discussion of Plaintiffs' other claim, I find that the deportation procedures does not implicate the Tenth Amendment or the guarantee clause even assuming that such issues are justiciable.

Finally, I'll note that Plaintiffs have failed to raise any substantive arguments in their opposition pertaining to this claim. I grant the motion to dismiss the eighth amendment (sic).

Costs of educating illegal immigrant children. In the ninth and final claim, Plaintiffs seek inter alia reimbursement for the costs of providing elementary and secondary education to undocumented aliens, asserting that Defendants' immigration policy is the cause of the influx of illegal immigrants and this influx in turn is the cause of the State's expenditure of education funds.

As Defendants Point out, the State's expenditure is not in fact caused by Defendants' policies. The expenditure is mandated by the Constitutions' Equal Protection clause as [p. 80] articulated in *Plyler v. Doe*, 457 U.S. 202.

> "Absent the constitutional mandate, the state will be free to deny public education to undocumented aliens, regardless of how many aliens enter this state."

But also Supreme Court noted in *Puerto Rico v. Branstad*, 483 U.S. 219, 228:

> "If a duty is directly imposed upon a state by the Constitution itself, there can be no need to

> weigh the performance of the federal obligation against the powers reserved to the states under the Tenth Amendment."

Thus, Plaintiffs' Tenth Amendment claims fail.

Plaintiffs' guarantee theory also fails for similar reasons. Plaintiffs contend the Federal Government has commandeered the State Government by adopting the immigration policy that requires the State Legislature to enact legislation and appropriate funds for illegal aliens.

However, it is the constitutional mandate that creates the duty to appropriate educational funds for undocumented alien children.

Plaintiff, therefore, fails to state a claim and I deny Defendants' motion to dismiss.

Finally, I find that Plaintiffs' claims for reimbursement of the costs of educating, incarcerating, and [p. 81] providing health care are barred by sovereign immunity.

> "Ordinarily, states, like all other entities, are barred from suing the United States in the absence of an express waiver of immunity by Congress." *Block v. North Dakota*, 461 U.S. 273, 280.

The Administrative Procedures Act, 5 USC 72, has a limited waiver of sovereign immunity as it authorizes challenges to agency action seeking relief other than monetary damages.

Although Plaintiff attempts to category the relief they seek as equitable and in the nature of restitution and reimbursement, I find that the claims are in fact claims

for money damages, against which Defendants are immune.

And I rely on *Bowen v. Massachusetts*, 487 U.S. 879, 895, for that discussion, as well as the Constitution's appropriation clause, Article I, Section 9, Clause 7 does not permit money to be paid out or the Treasury unless it's been appropriated by an Act of Congress. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 424.

> "In the absence of specific appropriation, federal courts are without authority to provide monetary relief in the form of reimbursement." *City of Houston v. Housing and Urban Development*, 24 Fed.3d 1421.

Therefore, 702 I hold does not provide a waiver of [p. 82] sovereign immunity for the reimbursement claim. I thus grant the motion to dismiss claims one, two, three, and nine on the alternative ground they are barred by sovereign immunity to the extent they seek monetary awards.

For all of these reasons then, I grant the Government's motion to dismiss and, being cognizant of the high standard that has to be demonstrated, given the fact that all of these reasons are based upon the law, I grant the motion to dismiss with prejudice.

I will ask that counsel for the United States draft a brief, bottom-line order, incorporate the oral ruling by reference, submit it to counsel for Plaintiffs and to me within five days. If they object as to form, they can in fact file an objection so saying within five days thereafter and I will decide what order I find is appropriate and draft it.

Assuming there is no objection, then I will draft (sic) the order that you submit.

Thank you all.

ALL: Thank you, your Honor.

[p. 83] (Proceedings recessed at 1:05 p.m.)

I certify, under penalty of perjury, that the foregoing is a verbatim transcription prepared from the electronic sound recording of the proceedings provided to me, and that said transcription is a true and accurate transcript to the best of my ability and belief.

/s/ Illegible
Transcriber

April 24, 1995
Date

APPENDIX C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA; PETE WILSON, Governor, RUSSELL S. GOULD, Director of Finance; JOE E. SANDOVAL, Secretary, Youth and Adult Correctional Agency; JAMES H. GOMEZ, Director, Department of Corrections; FRANSISCO J. ALARCON, Chief Deputy Director, Department of Youth Authority, SANDRA R. SMOLELY, Secretary, Health and Welfare Agency; S. KIMBERLY BELSHE, Director, Department of Health Services, Plaintiff, v. UNITED STATES OF AMERICA; JANET RENO; Attorney General; DORIS MEISSNER, Commissioner, Immigration and Naturalization Service; ALICE RIVLIN, Director, Office of Management and Budget, DONNA E. SHALALA, Secretary of Health and Human Services; BRUCE C. VLADNICK, Administrator, Health Care Fiancing [sic] Administration; RICHARD W. RILEY, Secretary of Education, Defendants.	Civ. No. 94-0674 K (CM) ORDER GRANTING MOTION TO DISMISS (Filed Mar. 2, 1995)

On November 30, 1995, Defendants filed their motion to dismiss the amended complaint in this action. On January 27, 1995, Plaintiffs filed their opposition to that motion. On February 6, 1995, Defendants filed their reply memorandum. Upon a review of the papers submitted, and after a hearing thereon on February 13, 1995, this Court granted the motion to dismiss with prejudice. The oral decision that this Court rendered at such hearing is hereby incorporated in its entirety by reference.

IT IS SO ORDERED.

DATE: 2-28-95

/s/ Judith N Keep
Judge of the District Court

Approved as to form:

/s/ N. E. Hill
N. EUGENE HILL
Assistant Attorney General
1515 K St., P.O. Box 944255
Sacramento, CA 94244-2550
Attorney for Plaintiff

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, ET AL.,	**JUDGMENT IN A CIVIL CASE**
V.	**CASE NUMBER:** CV 94-0674-K (CM)
UNITED STATES OF AMERICA, ET AL.,	(Filed Mar. 3, 1995)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this Court grants Defendants' Motion to Dismiss; case dismissed with prejudice.

March 3, 1995
Date

Roberta Westdal
Clerk

B. Khaleghi /s/ B. Khaleghi
(By) Deputy Clerk

ENTERED ON March 3, 1995

APPENDIX E

Article IV, Section 4. Protection of States Guaranteed *Republican Form of Government*

The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

AMENDMENT X

State Rights

[SECTION 1.] The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Proposed September 25, 1789; ratified December 15, 1791.

Title 8 U.S.C. § 1252(a)(2)(A), (B)

(a) Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congressional committees

(2)(A) The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation regardless of the

possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) and (d) of this section but subject to subparagraph (B) of this section, the Attorney General shall not release such felon from custody.

(B) The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

Text in effect 1994

Title 8 U.S.C. § 1252(a)(2)(A), (B)

(a) Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congressional committees

(2)(A) The Attorney General shall take into custody any alien convicted of any criminal offense covered in section 1251(a)(2), (B), (C), or (D), of this title, or any offense covered by section 1251(a)(2)(A)(ii) of this title for which both predicate offenses are covered by section 1251(a)(2)(A)(i) of this title, upon release of the alien from incarceration, shall deport the alien as expeditiously as possible. Notwithstanding paragraph (1) or subsections (c) and (d) of this section but subject to subparagraph (B)

of this section, the Attorney General shall not release such felon from custody.

(B) The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

Text in effect 1996

Title 8 U.S.C. § 1251

§ 1251. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens:

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who –

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an

alien provided lawful permanent resident status under section 1255(j) of this title) after the date of entry, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after entry is deportable.

(iv) High speed flight

Any alien who is convinced of a violation of section 758 of Title 18, (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the

United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after entry has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after entry is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate –

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of Title 18, for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of Title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title, is deportable.

Text in effect 1996

Title 8 U.S.C. § 1227

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens:

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who –

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an

alien provided lawful permanent resident status under section 1255(j) of this title) after the date of entry, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after entry is deportable.

(iv) High speed flight

Any alien who is convinced of a violation of section 758 of Title 18, (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the

United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after entry has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after entry is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate –

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of Title 18, for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of Title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title, is deportable.

Text became effective April 1, 1997.

Title 8 U.S.C. § 1226

§ 1226. Apprehension and detention of aliens

(c) Detention of criminal aliens. –

*(1) **Custody.** – The Attorney General shall take into custody any alien who –*

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [sic] [1] *to a term of imprisonment of at least 1 year, or*

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

*(2) **Release.** – The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of Title 18, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.*

Text became effective April 1, 1997

Title 8 U.S.C. § 1252(i)

(i) Expeditious deportation of convicted aliens

In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the

Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of the conviction.

Text in effect 1986

Title 8 U.S.C. § 1252(i)

(i) Expeditious deportation of convicted aliens

In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of the conviction. Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

Text in effect 1994

Title 8 U.S.C. § 1252a(a)

(a) Deportation of criminal aliens

(1) In general

The Attorney General shall provide for the availability of special deportation proceedings at certain Federal,

State, and local correctional facilities for aliens convicted of any criminal offense covered in section 1251(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 1251(a)(2)(A)(i) of this title. Such proceedings shall be conducted in conformity with section 1252 of this title (except as otherwise provided in this section), and in a manner which eliminates the need for additional detention at any processing center of the Service and in a manner which assures expeditious deportation following the end of the alien's incarceration for the underlying sentence.

(2) Implementation

With respect to an alien convicted of an aggravated felony who is taken into custody by the Attorney General pursuant to section 1252(a)(2) of this title, the Attorney General shall, to the maximum extent practicable, detain any such felon at a facility at which other such aliens are detained. In the selection of such facility, the Attorney General shall make reasonable efforts to ensure that the alien's access to counsel and right to counsel under section 1362 of this title are not impaired.

(3) Expeditious proceedings

(A) Notwithstanding any other provision of law, the Attorney General shall provide for the initiation and, to the extent possible, the completion of deportation proceedings, and any administrative appeals thereof, in the case of any alien convicted of an aggravated felony

before the alien's release from incarceration for the underlying aggravated felony.

(B) Nothing in this section shall be construed as requiring the Attorney General to effect the deportation of any alien sentenced to actual incarceration, before release from the penitentiary or correctional institution where such alien is confined.

Text in effect 1996

Title 8 U.S.C. § 1228

§ 1228. Expedited deportation of aliens convicted of committing aggravated felonies

(a) Removal of criminal aliens

(1) In general

The Attorney General shall provide for the availability of special removal proceedings at certain Federal, State, and local correctional facilities for aliens convicted of any criminal offense covered in section 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 1227(a)(2)(A)(i) of this title. Such proceedings shall be conducted in conformity with section 1229a of this title (except as otherwise provided in this section), and in a manner which eliminates the need for additional detention at any processing center of the Service and in a

manner which assures expeditious removal following the end of the alien's incarceration for the underlying sentence. Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(2) Implementation

With respect to an alien convicted of an aggravated felony who is taken into custody by the Attorney General pursuant to section 1226(c) of this title, the Attorney General shall, to the maximum extent practicable, detain any such felon at a facility at which other such aliens are detained. In the selection of such facility, the Attorney General shall make reasonable efforts to ensure that the alien's access to counsel and right to counsel under section 1362 or this title are not impaired.

(3) Expedited proceedings

(A) Notwithstanding any other provision of law, the Attorney General shall provide for the initiation and, to the extent possible, the completion of removal proceedings, and any administrative appeals thereof, in the case of any alien convicted of an aggravated felony before the alien's release from incarceration for the underlying aggravated felony.

(B) Nothing in this section shall be construed as requiring the Attorney General to effect the removal of any alien sentenced to actual incarceration, before release

from the penitentiary or correctional institution where such alien is confined.

Text became effective April 1, 1997

Title 8 U.S.C. § 1252(c)

Final order of deportation; place of detention

(c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is bad, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the

order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section. The Attorney General is authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section. Where no Federal buildings are available or buildings adapted or suitably located for the purpose are available for rental, the Attorney General is authorized, notwithstanding section 5 of Title 41 or section 278a of Title 40 to expend, from the appropriation provided for the administration and enforcement of the immigration laws, such amounts as may be necessary for the acquisition of land and the erection, acquisition, maintenance, operation, remodeling, or repair of buildings, sheds, and office quarters (including living quarters for officers where none are otherwise available), and adjunct facilities, necessary for the detention of aliens. For the purposes of this section an order of deportation heretofore or hereafter entered against an alien in legal detention or confinement other than under an immigration process, shall be considered as being made as of the moment he is released from such detention or confinement, and not prior thereto.

* * *

Title 8 U.S.C. § 1231(a)(1)(A)

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall be Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

Text became effective April 1, 1997

Title 8 U.S.C. § 1326

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who –

(1) has been arrested and deported or excluded and deported, and thereafter

(2) others attempts to enter, or is at any time found in the United States, unless (A) prior to his deportation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission: or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act.

shall be fined under Title 18, or imprisoned not more than 3 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection

(1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony other than an aggravated felony), such alien shall be fined under Title 18, imprisonment and more than 10 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both.

For the purposes of this subsection, the term "deportation" includes any agreement in which an alien stipulates to deportation during a criminal trial under either Federal or State law.

Text in effect in 1994.

Title 8 U.S.C. § 1326

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who –

(1) has been arrested and deported, has been excluded and deported, or has departed the United States while an order of exclusion or deportation is outstanding, and thereafter,

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both; or

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18, and imprisoned for a period of 10

years, which sentence shall not run concurrently with any other sentence.

For the purposes of this subsection, the term "deportation" includes any agreement in which an alien stipulates to deportation during (or not during) a criminal trial under either Federal or State law.

(c) Any alien deported pursuant to section 1252(h)(2) of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) of this section unless the alien demonstrates that –

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

Text in effect 1996

* * *

Title 8 U.S.C. § 1326

§ 1326. Reentry of removed alien; criminal penalties for reentry of certain removed aliens

(a) Subject to subsection (b) of this section, any alien who –

(1) has been denied admission, excluded, deported, or removed, or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter.

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removal unless such alien shall establish that he was not required to obtain such advance consent under this chapter of any prior Act, shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18, and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence, or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Any alien removed pursuant to section 1252(h)(2) of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of removed aliens as may be available under this section or any other provision of law.

(d) In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) of this section unless the alien demonstrates that –

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

Text became effective April 1, 1997

Title 42 U.S.C. § 1396(b)(v)

(v) Medical assistance to aliens not lawfully admitted for permanent residence

(1) Notwithstanding the preceding provisions of this section, except as provided in paragraph (2), no payment may be made to a State under this section for medical assistance furnished to an alien who is not lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law.

(2) Payment shall be made under this section for care and services that are furnished to an alien described in paragraph (1) only if –

(A) such care and services are necessary for the treatment of an emergency medical condition of the alien,

(B) such alien otherwise meets the eligibility requirements for medical assistance under the State plan approved under this subchapter (other than the requirement of the receipt of aid or assistance under subchapter IV of this chapter, supplemental security income benefits under subchapter XVI of this chapter, or a State supplementary payment), and

(C) such care and services are not related to an organ transplant procedure,

(3) For purposes of this subsection, the term "emergency medical condition" means a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in –

(A) placing the patient's health in serious jeopardy,

(B) serious impairment to bodily functions, or

(C) serious dysfunction of any bodily organ or part.

APPENDIX F

DANIEL E. LUNGREN, Attorney General
of the State of California
FLOYD D. SHIMOMURA, State Bar No. 058294
Assistant Attorney General
LINDA A. CABATIC, State Bar No. 87483
Supervising Deputy Attorney General
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA; PETE WILSON, Governor, RUSSELL S. GOULD, Director of Finance, State of California; JOE G. SANDOVAL, Secretary, Youth and Adult Correctional Agency; JAMES H. GOMEZ, Director, Department of Corrections, State of California; FRANCISCO J. ALARCON, Chief Deputy Director, Department of Youth Authority, State of California, SANDRA R. SMOLEY, Secretary, Health and Welfare Agency, State of California; S.	No. 94-0674 K (CM) **AMENDED COMPLAINT FOR DECLARATORY AND MANDATE RELIEF AND INJUNCTION** (Filed Sep. 22, 1994)

KIMBERLY BELSHE, Director, Department of Health Services, State of California,

Plaintiffs,

v.

UNITED STATES OF AMERICA; JANET RENO, Attorney General, United States; DORIS MEISSNER, Commissioner, Immigration and Naturalization Service, United States; ALICE RIVLIN, Acting Director, Office of Management and Budget, United States, DONNA E. SHALALA, Secretary of Health and Human Services, United States; BRUCE C. VLADECK, Administrator, Health Care Financing Administration; RICHARD W. RILEY, Secretary of Education, United States,

Defendants.

PLAINTIFFS, FOR CLAIMS AGAINST DEFENDANTS, ALLEGE:

PRELIMINARY STATEMENT AND SUMMARY

1. Under our constitutional system, the power to regulate immigration is vested solely in the Government of the United States. It executes its immigration policy through the Attorney General, to whom enforcement

authority is delegated by the President and the Congress of the United States, and through the United States Immigration and Naturalization Service, administered by its Commissioner.

2. The sovereign states of the United States must rely on the Government of the United States to protect their borders against illegal immigration and to effectively exercise the Government's authority over immigration.

3. Unfortunately, the federal government's border policy has been a dismal failure. Thousands of undocumented immigrants stream across the border. According to the INS's own estimates, the numbers of permanent illegal residents in California increases by approximately 125,000 a year. Despite the fact that millions of undocumented immigrants were granted amnesty under the Immigration and Reform Act of 1986 (IRCA), using INS data an additional 1.7 million undocumented aliens now reside in California as of 1992. Owing to the federal government's manifestly inadequate enforcement policy, its failure to observe its obligations under statutory and constitutional law, and its reliance on policies which actually impede identification and deportation of undocumented immigrants, California continues to be subjected to a massive incursion of undocumented immigrants.

4. As a result, California has at least 43% of all undocumented aliens residing in the United States, according to estimates of the U.S. Attorney General. They constitute 5% of the entire population of California, and the numbers increase at a rate of approximately 125,000 a year, an amount and a rate of far greater magnitude than

that experienced by any other state. Illegal immigrants will cost California taxpayers $2.4 billion this fiscal year to provide federally mandated education and health care and to pay for the incarceration of those who commit criminal offenses.

5. These costs of illegal immigration should instead be the responsibility of the federal government. Despite congressional authorization to reimburse California, California has borne the costs of incarcerating illegal aliens who commit felonies; despite statutory obligations to promptly commence deportation proceedings and take illegal alien felons into custody upon their release, California has had to bear the cost of supervising illegal aliens who are on parole; despite constitutional provisions gluaranteeing [sic] California's sovereign rights, California has been required to expend its own state financial resources for federally mandated medical and educational benefits to illegal immigrants on a scale experienced by no other state, thereby depriving the lawful residents of California of the services which those funds purchase.

6. This proceeding is brought to require the Government of the United States to comply with its constitutional and statutory obligations to protect the border of California against illegal immigration and to seek reimbursement from the federal government for the costs which California has sustained including the cost of imprisonment of illegal alien felons, the cost of emergency medical care, and the cost of public elementary and secondary education to undocumented aliens.

7. By this action, the State of California, its Governor, and pertinent state officials seek the intervention of the courts to correct federal action that cannot be corrected in any other way: to enforce the federal government's obligation to protect California's borders against a massive influx of illegal immigrants under Article IV, § 4 of the U.S. Constitution; to enforce the federal government's statutory obligations to deport in a timely and effective fashion illegal immigrants apprehended in California; to strike down laws and policies which impede the identification and deportation of illegal immigrants; and, to reimburse the State for the financial consequences of the federal government's failure to abide by its constitutional and statutory obligations.

PARTIES

Plaintiffs

8. Plaintiff, State of California, is a sovereign state of the United States of America.

9. Plaintiff Pete Wilson is the duly elected and acting Governor of the State of California, and in that capacity is vested with the supreme executive power of the State of California and is responsible for the faithful execution of all laws and for annually developing a unified, comprehensive, and balanced state budget generally reflecting spending priorities and policy preferences for the State of California. Plaintiff Wilson sues herein in his official capacity.

10. Plaintiff Russell S. Gould is the duly appointed and acting Director of Finance, State of California. In that

capacity he has general powers of supervision and control over the Department of Finance, State of California, and is responsible for the administration of that department and the execution of all duties and responsibilities vested by law in that department. The Department of Finance prepares and presents the annual primary and secondary education budget for the State of California. The Department allocates nearly $38 billion in total funds to education, including nearly $20 billion in funds from the State General Fund, approximately 48% of the State General Fund budget. In executing those duties delegated to it by law relating to state fiscal policy and administration of the state budget. The Department allocates funds for public primary and secondary education appropriated by the Legislature, analyzes legislative spending proposals for public primary and secondary education and performs fiscal and performance audits and reviews of various educational departments and programs, including those providing public primary and secondary education. Reference in this complaint to the "DOF" is to the State Department of Finance; reference to the "Director DOF" is to Plaintiff Gould.

11. Plaintiff Joe G. Sandoval is the duly appointed and acting Secretary, Youth and Adult Correctional Agency, and is vested with those powers specified in Government Code sections 12811, 12850 et seq., and in that capacity has the power of general supervision over and is directly responsible to the Governor for the operations of the Department of Corrections, the Department of the Youth Authority, the Board of Prison Terms and the Youthful Offender Parole Board, including their sound

fiscal management. Plaintiff Sandoval sues herein in his official capacity.

12. Plaintiff James H. Gomez is the duly appointed and acting Director of the Department of Corrections, State of California, and in that capacity is the chief administrative officer of the Department of Corrections, supervises, manages and controls the California prison system, and is responsible for the care, custody, treatment, training, discipline and employment of persons confined therein, and on parole after release therefrom. All powers and duties granted to or imposed upon the Department are exercised by the Director. Plaintiff Gomez sues in his official capacity. All references in this complaint to "CDC" are to the California Department of Corrections.

13. Plaintiff Francisco J. Alarcon is the Chief Deputy Director of the Department of the Youth Authority, State of California, and in that capacity is responsible for housing youthful offenders and is responsible for the supervision of youthful offenders while in custody and after release on parole and exercises all powers, duties and functions pertaining to the care and treatment of wards committed to the Department. Plaintiff Alarcon sues herein in his official capacity. All references in this complaint to "CYA" are to the California Department of the Youth Authority.

14. Plaintiff Sandra R. Smoley is the duly appointed and acting Secretary, Health and Welfare Agency, State of California, and is vested with those powers specified in Government Code sections 12810, 12850 et seq., and in that capacity has the power of general supervision over

and is directly responsible to the Governor for the operations of the Department of Health Services, including its sound fiscal management. Plaintiff Sandra R. Smoley sues herein in her official capacity.

15. Plaintiff S. Kimberly Belshé is the duly appointed and acting Director of the Department of Health Services, State of California. The Department of Health Services is the single State agency responsible for the administration of the Medicaid Program for the State of California in accordance with State and federal law, including Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., and pursuant to the State Medicaid Plan approved by the Secretary. Plaintiff S. Kimberly Belshé is the chief executive and administrative officer of the Department of Health Services, State of California, and supervises, manages and controls the duties and responsibilities of that Department, including those relating to the provision of such health care as required by law for the treatment of aliens not lawfully admitted for permanent residence or otherwise permanently residing in the United States. Plaintiff S. Kimberly Belshé sues in her official capacity. All references in this complaint to "DHS" are to the Department of Health Services, State of California. All references in this complaint to "DHS Director" are to Plaintiff S. Kimberly Belshé.

Defendants

16. Defendant United States of America is a sovereign constitutional government of those limited enumerated powers specified in the Constitution of the United States, which include sole responsibility for defining and

enforcing immigration policy for the United States of America. All references in this complaint to the "United States" refer to Defendant United States in its sovereign capacity.

17. Defendant Janet Reno is Attorney General of the United States and is responsible, by delegation from the President and Congress of the United States, for the execution and administration of all laws relating to immigration, naturalization and alien registration and for the allocation and expenditure of all funds in the United States Treasury appropriated or otherwise available for implementation of all laws relating to immigration, naturalization and alien registration. All references in this complaint to the "Attorney General" refer to Defendant Janet Reno.

18. Defendant Alice Rivlin is Acting Director of the Office of Management and Budget and is responsible for development and management of the budget of the United States and for the management and implementation of appropriations made by Congress. All references in this complaint to the "Director" are to Defendant Alice Rivlin.

19. Defendant Doris Meissner is Commissioner, Immigration and Naturalization Service, United States, and is, by delegation from the Attorney General and Congress of the United States, responsible for the administration of the Immigration and Naturalization Service of the United States and all duties and responsibilities vested in USINS. The United States Immigration and Naturalization Service is referred to herein as "USINS".

All references in this complaint to the "Commissioner" are to Defendant Doris Meissner.

20. Defendant Donna E. Shalala, Secretary of Health and Human Services, United States, is, by delegation from the President and Congress of the United States, responsible for the administration of the United States Department of Health and Human Services, including the Medicaid Program and all duties and responsibilities vested in the Department of Health and Human Services. The United States Department of Health and Human Services is referred to herein as "USHHS". All references in this compla[illegible] to the "HHS Secretary" are to Defendant Donna E. Shalala.

21. Defendant Bruce C. Vladeck, Administrator, Health Care Financing Administration, United States, is by delegation from the Secretary of Health and Human Services and the Congress of the United States responsible for the administration of the Health Care Financing Administration of the United States and is further responsible for the administration and implementation of all duties and responsibilities vested in that Administration. All references in this complaint to the "Administrator" are to Defendant Vladeck. All references in this complaint to "HCFA" are to the Health Care Financing Administration.

22. Defendant Richard W. Riley, Secretary of Education, United States, is, by delegation from the President and Congress of the United States, responsible for the administration of the United States Department of Education, including the Elementary and Secondary Education Act of 1965, as amended, and all education programs

authorized by that Act, including those applicable to migrant children, and appropriations made to implement that Act and all duties and responsibilities vested in the Department of Education. The United States Department of Education is referred to herein as "USDE". All references in this complaint to the "Education Secretary" are to Defendant Richard W. Riley.

23. Defendants Shalala, Vladeck, Reno, Meissner, Rivlin, and Riley are sued in their official capacities.

JURISDICTION

24. This Court has jurisdiction over all claims asserted in this action pursuant to 28 U.S.C. § 1331 because all matters in controversy arise under the Constitution and laws of the United States.

25. This Court has jurisdiction over all claims asserted in this action pursuant to 28 U.S.C. § 1361 because the action is one in the nature of mandamus and seeks to compel officers of the United States to perform duties owed to plaintiffs under the Constitution of the United States, the Immigration and Nationality Act and the Social Security Act.

26. This Court has jurisdiction over all claims asserted in this action pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706, because the actions of defendants are arbitrary, capricious and contrary to federal law.

27. This Court has jurisdiction over all claims asserted in this action pursuant to 28 U.S.C. §§ 2201 and 2202 because there is an actual controversy between

plaintiffs and defendants requiring resolution by declaration of this court.

28. This Court has jurisdiction over all claims asserted in this action pursuant to 28 U.S.C. § 1346 because the claims are asserted against officials of the United States acting in their official capacities.

VENUE

29. A substantial portion of the events or omissions giving rise to the claims alleged arose within the jurisdiction of United States District Court for the Southern District of California. Venue is proper in this Court pursuant to 28 U.S.C. § 1391, subdivisions (b) and (e).

FIRST CLAIM FOR RELIEF

[Article IV, Section 4, United States Constitution]

FOR A FIRST CLAIM FOR RELIEF, Plaintiffs allege as follows:

30. The United States is required by the Constitution of the United States to guarantee the State of California a republican form of government and is further required to protect the State of California against invasion.

31. The purpose of Article IV, Section 4 of the Constitution of the United States is to protect the states, including the State of California, against unlawful, massive migrations across their borders from foreign countries. By entry into union with the United States of America, the several states of the United States, including

the State of California, surrendered to the United States its right to protect its borders against such unlawful mass migrations by conferring that right upon the United States in exchange for a guarantee from the United States to protect them against such action.

32. The term "undocumented" or "illegal" alien as used in this complaint refers to aliens not entitled to lawfully immigrate to the United States, who have unlawfully entered the State of California and remain unlawfully within the State of California.

33. The State of California is facing a massive and continuing influx of illegal immigrants into this State, in numbers and at a rate greater then any other single state. The sheer size and impact ofthis [sic] unauthorized migration has been characterized as an invasion. (Remarks of Rep. Lowery, 132 Cong. Rec. 3466 (1986).) As of the date of filing this amended complaint, there are present approximately 1.7 million undocumented aliens in the State of California, comprising approximately five percent of the total population of the State. Indeed, defendants Attorney General and Commissioner estimate that in October 1992, there were approximately 3.4 million undocumented aliens residing in the United States, and this population grows by an annual average of 300,000, and further estimate that 43 per cent [sic] of the undocumented aliens residing in the United States reside in the State of California. Said defendants further estimate that the number of undocumented aliens in the State of California is three times that of the State of New York, the second most heavily impacted state; four times that of the State of Florida; and four times that of the State of Texas.

34. The presence of approximately 1.7 million undocumented aliens within the State of California is the result of the illegal entry of foreign nationals into the State of California over a sustained period of time and continues at the rate of approximately 125,000 per year.

35. Plaintiffs are informed and believe and, based on that information and belief, allege that the illegal entry of foreign nationals into the State of California, as alleged above, has been aided by networks of people and by the dissemination of information through such networks concerning the benefits of residing in the State of California and how those benefits may be acquired.

36. The massive and unlawful migration of foreign nationals, on the scale alleged above, constitutes an invasion of the State of California against which the United States is obligated to protect California, pursuant to Article IV, Section 4 of the Constitution of the United States.

37. The defendants have failed to effectively protect the border of California against this unlawful entry of illegal immigrants. In fact, defendants failed to commence deportation proceedings as required under 8 U.S.C. § 1252(i), to take into custody illegal aliens convicted of aggravated felonies as required under 8 U.S.C. § 1252, to prosecute those who illegally re-enter after being formally deported as required under 8 U.S.C. § 1326, or to effectively deport illegal immigrants.

38. The United States has required the State of California to raise funds by the levy of taxes, and to appropriate and expend such funds to provide health care and public primary and secondary education to those undocumented aliens present in the State of California as

a result of the federal government's refusal to control and protect the border and has further required such funds be expended for the apprehension, conviction and incarceration of undocumented aliens who have committed felonies in the State of California. The United States has required the State of California to enact laws implementing the immigration policy of the United States, and by doing so has "commandeered" the Legislature of the State of California to execute Federal immigration policy.

39. The United States, acting through Congress and its Executive, has implemented policies which impede the apprehension and deportation of illegal aliens. Such laws impede plaintiffs' and defendants' ability to protect against, or cure the effects of, the massive illegal immigration.

40. The State of California has sought remedial action by the United States and the United States has refused to take effective action to repel and terminate the illegal and massive incursion of foreign nationals and to remove those illegals presently residing in the State of California. The result of that refusal is the continued and massive incursion of illegal foreign nationals into the State of California.

41. The State of California has exhausted all other political and practical remedies, and any remedy provided by law, to obtain reimbursement from the United States and has no other recourse but to seek judicial relief and orders from this Court declaring the right of the State of California to such reimbursement under federal law, and the exercise of equitable jurisdiction of this Court implementing such determination and declaring that any

law or policy of the United States that prevents reimbursement is void and in conflict with Article IV, section 4, and the Tenth Amendment of the United States Constitution.

42. The State of California requests this Court exercise its equitable jurisdiction to remedy the failure of the United States to protect the State of California from the massive influx of illegal aliens that has occurred and is continuing to occur including the strict enforcement of statutory duties under 8 U.S.C. §§ 1252 and 1326, and to guarantee the sovereignty of the state and a republican form of government to the people of the State of California.

43. The State of California, in furtherance of the equitable jurisdiction of this Court, to encourage the apprehension and deportation of illegal aliens, seeks equitable relief from this Court prohibiting the United States, and defendants in this action, from enforcing any law enacted by the Congress of the United States, or any regulation adopted by defendants, which impedes the State of California, and plaintiffs in this action, from determining the presence of illegal aliens within the State of California and from advising defendants of the presence of such illegal aliens. Until such time that defendants perform their obligations under article IV, section 4 of the United States Constitution and Statues [sic], the State of California, to insure the continuation of a republican form of government within the State of California and to enforce its right to have its borders protected from massive unlawful immigration by foreign nationals, and in furtherance of the equitable jurisdiction of this Court, seeks further equitable relief from this Court requiring

the United States and defendants to pay to the State of California, from any funds of the United States subject to the equitable jurisdiction of this Court, the cost of providing health care ($1.8 billion), the cost of primary and secondary education ($5.4 billion), and incarceration costs attributable to those illegal aliens now residing within the State of California ($1.45 billion), and those costs attributable to those illegal aliens that continue to invade the State of California, as paid by the State.

SECOND CLAIM FOR RELIEF

[Tenth Amendment, Article IV, Section 4, United States Constitution]

FOR A SECOND CLAIM FOR RELIEF, Plaintiffs State of California, Pete Wilson, Sandra R. Smoley and Kimberly Belshé allege as follows:

44. Plaintiffs reallege paragraphs 1 through 35 of this complaint, inclusive, and, by this reference, incorporate the allegations of paragraphs 1 through 43 herein.

45. In 1986, the United States Congress enacted Public Law 99-509, the omnibus Budget Reconciliation Act of 1986, 100 Stat. 3359. Among its provisions, this statute amended the Social Security Act to require the State of California to provide medical assistance to aliens who are not lawfully admitted to the United States for permanent residence or not otherwise permanently residing in the United States under color of law. 42 U.S.C. § 1396b(v). Reference in this complaint to "OBRA 86" is to the Omnibus Budget Reconciliation Act of 1986, 100 Stat. 3359, Pub. L. 99-509.

46. The enactment of OBRA 86, along with other provisions of law, represented an attempt by the United States to comprehensively legislate the status of undocumented aliens in the United States as they existed at that time, and represents an integral part of the immigration policy of the United States applicable to undocumented aliens. To further federal immigration policy, the Medicaid Program was amended to require that all states add OBRA 86 Aliens as persons eligible to receive specified Medicaid benefits. The federal Medicaid Program is described in paragraph 67 and following.

47. OBRA 86 was enacted as part of a comprehensive package of immigration reform intended to dramatically reduce the flow of undocumented immigrants into the United States. This policy, as reflected in the Immigration Reform and Control Act of 1986 (IRCA) (Pub. L. 99-603), combined a broad grant of amnesty for qualified undocumented immigrants already in the country with strict employer sanctions. These changes failed to stem the tide of illegal immigration. The group of aliens eligible to receive emergency health care under OBRA 86 has not diminished; instead it has dramatically increased since the enactment of OBRA 86. The decision to require Medicaid coverage of eligible undocumented aliens was based, in part, on the anticipated success of IRCA sanctions.

48. All references in this complaint to "OBRA 86 Aliens" are to those aliens who are not lawfully admitted to the United States for permanent residence or who are not otherwise permanently residing in the United States under color of law, as those terms are used in 42 U.S.C. § 1396b(v), and who otherwise meet the eligibility

requirements for medical assistance, as provided in 42 U.S.C. § 1396b(v)(2)(B).

49. The Medicaid statutes had not explicitly identified whether otherwise eligible aliens of any category were entitled to benefits. By regulation in 1973, the Secretary limited Medicaid eligibility to otherwise eligible aliens who were lawfully admitted for permanent residence or permanently residing in the United States under color of law.

50. In 1965 the United States established a program of federal reimbursement to assist states in providing medical care to persons with low income. This program is set forth in Title XIX of the Social Security Act, originally enacted by Congress in 1965 as Public Law 89-97, 42 U.S.C. § 1396 et seq. It is generally referred to as the Medicaid Program. All references in this complaint to "Medicaid" or the "Medicaid Program" are to the program to provide medical care for the poor as set forth in Title XIX of the Social Security Act, as amended.

51. The Medicaid Program is a state-administered program to provide medically necessary services to needy persons that is jointly funded by the federal and state governments. To receive federal financial assistance under the program, the State of California must have an approved "State Plan" which must comply with Medicaid Program requirements.

52. Federal funds are provided to the State of California only after the Secretary has received and approved California's "State Plan." A State Plan must cover individuals receiving aid or assistance under federally aided

programs for the aged, blind, disabled, and needy families with children. Persons who do not meet the income requirements for cash aid or assistance may also be covered, but in "amount, duration, or scope" no greater than that extended to cash recipients. 42 U.S.C. § 1396a(a)(10).

53. Statutes were enacted by the California Legislature in 1965 in order to establish a program of basic and extended health care services for recipients of public assistance and, by meeting the requirements of federal law, to qualify California for the receipt of federal funds made available under Title XIX of the Social Security Act. All references in this complaint to "Medi-Cal" or the "Medi-Cal Program" are to the program enacted by the State of California to implement the Federal Medicaid Program. California receives federal Medicaid reimbursement for its Medi-Cal Program (Cal. Welf. & Inst. Code, § 14000 et seq.), which is the Medicaid Program for the State of California.

54. Medi-Cal is designed to provide necessary medical care, including physician services, prescription medicines, hospitalizations, and the like, to persons of limited means pursuant to Medicaid requirements. Those eligible for Medi-Cal, if all program requirements are met, are persons under age 21, or 65 years of age and older; recipients of Aid to Families with Dependent Children (AFDC); recipients of Supplemental Security Income/State Supplemental Payment (SSI/SSP); persons who are linked to AFDC; pregnant women; refugees who are linked to AFDC or SSI/SSP or who have resided in the country for eight months or less; and persons who are blind or disabled.

55. The HHS Secretary adopted regulations implementing OBRA 86. At all times relevant to the allegations of this complaint, the regulations implementing OBRA 86 are set forth in 42 C.F.R. §§ 435.406(c) and 440.255(c). The Administrator is charged by law and delegation to implement and apply the provisions of 42 C.F.R. §§ 435.406(c) and 440.255(c) to the State of California and its State Medicaid Plan.

56. All references in this complaint to "emergency health care" are to medical assistance in the form of care and services furnished to undocumented aliens for the treatment of emergency medical conditions as that term is defined in 42 U.S.C. § 1396b(v)(3) and 42 C.F.R. § 440.255(c).

57. By enactment of OBRA 86, Congress then defined an emergency medical condition for this population to be a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. 42 U.S.C. § 1396b)(v)(3).

58. The United States now requires the State of California to include "labor and delivery" services within the definition of emergency health care services and to provide those labor and delivery services to OBRA 86 Aliens. During calendar year 1992, approximately 40 percent of the births paid for by the State of California Medi-Cal Program were to OBRA 86 Aliens. In that calendar year,

approximately 237,000 babies were born to Medi-Cal recipients, of whom approximately 96,000, or approximately 40 percent, were born to OBRA 86 Aliens. The expenditure of funds, as set forth in paragraphs 52, 53 and 54 includes the costs to the State of California to provide such services to OBRA 86 Aliens for labor and delivery services. During calendar year 1992, there were approximately 21,662 deliveries in Los Angeles County Hospitals to women defined herein as OBRA 86 Aliens and paid for by the State of California as required emergency health services. Those births constitute approximately 62 percent of all live births in Los Angeles County Hospitals' inpatient departments for calendar year 1992.

59. Following the enactment of OBRA 86, and at all times relevant to the facts alleged in this complaint, the Social Security Act (42 U.S.C. § 1396b(v)) requires the State of California to provide care and services to eligible aliens who are not lawfully admitted to the United States for permanent residence or who are not otherwise permanently residing in the United States under color of law when the care and services are necessary for the treatment of an emergency medical condition of the alien. The alien must otherwise meet the eligibility requirements for medical assistance as set forth in the State Medicaid Plan approved by the Secretary for federal financial participation and administration in the State of California.

60. In 1988, the State of California enacted legislation, including Welfare and Institutions Code section 14007.5 (Senate Bill 175, Stats. 1988, ch. 1441), to authorize the Medi-Cal Program to provide emergency health care to OBRA 86 Aliens, and such provisions, as amended (Senate Bill 485, Stats. 1992, ch. 722), were in full force

and effect at all times relevant to the allegations set forth in this complaint. The enactment of Welfare and Institutions Code section 14007.5 was required by federal law and does not represent an independent policy decision of the State of California or plaintiffs. The definition of emergency health care, as required by federal law was included in Welfare and Institutions Code section 14007.5 as enacted by Senate Bill 175, and as amended by Senate Bill 485. References in this complaint to "SB 175" are to chapter 1441 of the Statutes of 1988, as originally enacted and as amended by chapter 722 of the Statutes for the State of California.

61. In the first year of implementation, State Fiscal Year 1988-89, the State of California was required by federal law to provide emergency medical services to approximately 31,600 OBRA 86 Aliens, at a State General Fund cost of $21.1 million. Since that time, the numbers of eligible OBRA 86 Aliens have risen dramatically. In State Fiscal Year 1992-93, the State of California was required by federal law to provide emergency services to approximately 299,900 OBRA 86 Aliens, at a State General Fund cost of $337.5 million.

62. It is estimated that during the State Fiscal Year that began on July 1, 1993, and ended on June 30, 1994, there were approximately 309,100 OBRA 86 Aliens eligible to receive emergency health care in each month. The annual General Fund cost to the State of California is estimated to have been $369.8 million in State Fiscal Year 1993-94. It is estimated that approximately 317,500 OBRA 86 Aliens will be eligible to receive emergency services each month in State Fiscal Year 1994-95, at a State General Fund total annual cost of $394.9 million.

63. Beginning in State Fiscal Year 1988-89, and continuing through State Fiscal Year 1994-95, the State of California has or will expend approximately $1.8 billion from its General Fund to provide emergency health care to OBRA 86 Aliens, as set forth below:

OBRA 86 PROGRAM ELIGIBLES AND COST DATA

	Average Monthly Eligibles	Total State General Fund Expenditures
FY 88-89	31,557	$ 21,103,920
FY 89-90	92,832	$127,255,967
FY 90-91	172,176	$214,008,085
FY 91-92	254,349	$296,352,334
FY 92-93	299,900	$337,514,694
FY 93-94(est)	309,100	$369,811,007
FY 94-95(est)	317,500	$394,925,217
	TOTAL:	$1,760,971,224

These funds do not include additional expenditures by state and local agencies for the following:

- The costs of providing medical or welfare services to citizen children of undocumented aliens.

- The costs of providing health care to undocumented aliens who are provided emergency services but are not eligible for Medi-Cal, such as single adults between ages 18 and 64 who are not disabled.

- The costs of emergency and pregnancy-related health care for undocumented aliens whose services are paid for through Medi-Cal aid categories different from the aid category utilized to track OBRA 86 aliens.

- The costs of providing services totally funded by the State of California to OBRA 86 Aliens pursuant to State law.

64. Immediately prior to the enactment of OBRA 86, the State Medicaid Plan approved for the State of California did not provide emergency health care to persons who are defined in this complaint as OBRA 86 Aliens.

65. Failure of the State of California to provide emergency health care to OBRA 86 Aliens, would under federal law eliminate federal financial participation for medical assistance under the approved plan of medical assistance for the State of California. 42 U.S.C. § 1396c.

66. At this point in the program, without a new and substitute source of funds, the State cannot chose [sic] to discontinue the program despite the substantial burden placed on it by OBRA 86 requirements. As a result, California has been coerced into complying with OBRA 86 under threat of losing federal funds. The United States used the provisions of Medicaid statutes and 42 U.S.C. § 1396C to coerce the State of California to provide emergency health care to OBRA 86 aliens, and by such coercion has made the implementation of these provisions mandatory and not discretionary.

67. The fiscal impact of the State Medicaid Plan upon the State of California and the system by which health care is provided to its lawful residents prevents the State of California from withdrawal from the Medicaid Program, and the health care delivery system that includes Medicaid, to avoid providing emergency health care to OBRA 86 Aliens. The United States is aware that withdrawal from Medicaid would collapse into chaos,

then public and private health care delivery for people in the State of California dependent on that system.

68. Since the implementation of OBRA 86 in State Fiscal Year 1988-89, and continuing through State Fiscal Year 1994-95, the State of California will have expended over $30 billion from its General Fund in support of the Medi-Cal Program, including providing required benefits to OBRA 86 Aliens. Pursuant to Federal law, the United States provides approximately an equal sum in support of the program. In excess of five million residents of the State of California are currently eligible to receive benefits from the Medi-Cal Program. Approximately 1200 long-term health care facilities serving over 70,000 residents, totally reliant upon 24-hour nursing care, are dependent on Medicaid funding. The absence of Medicaid funding to provide health care to the poor would jeopardize the continued economic viability of virtually all public hospitals and many private hospitals in the State of California. The average monthly number of residents eligible to receive benefits from the Medi-Cal Program and the expenditures from the General Fund of the State of California in support of the program, during the period July 1, 1988, and extending through June 30, 1995, are as follows:

TOTAL MEDI-CAL PROGRAM ELIGIBLES AND COST DATA

Average Monthly Eligibles		General Fund Dollars
FY 88-89	3,222,793	$3,004,588,000
FY 89-90	3,508,881	$3,450,061,000
FY 90-91	4,068,039	$3,994,530,000

FY 91-92	4,616,182	$5,778,980,000[1]
FY 92-93	4,996,100	$5,373,262,000
FY 93-94(est)	5,291,100	$5,712,297,000
FY 94-95(est)	5,589,900	$6,585.715,500[2]
TOTAL:		$33,899,433,500

69. In each State Fiscal Year since the enactment SB 175, the State of California has appropriated and expended funds raised by the State of California pursuant to existing state laws to provide emergency health services to OBRA 86 Aliens.

70. The requirement by the United States that the State of California fund fifty per cent of the cost of emergency health care to OBRA 86 aliens was imposed upon the State of California with the knowledge and intent that the State had no choice but to continue to provide such care and to continue to expend state tax funds, and the imposition of OBRA 86 was intended by the United States as a mandatory and not optional requirement.

71. The Department of Health and Human Services Appropriations Act, 1994, (Public Law 103-112; 107 Stat. 1082) appropriates in excess of $91 billion from the United States Treasury to the HHS Secretary for expenses necessary for the administration and enforcement of laws relating to the Medicaid Program. Public Law 103-112 provides:

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[1] Includes one-time accrual accounting charge.

[2] Does not reflect proposed savings from immigration relief, higher federal matching fund percentage for Medicaid or changes to county matching fund requirements.

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That the following sums are appropriated out of any money in the Treasury not otherwise appropriated for the Departments of * * * Health and Human Services * * * for the fiscal year ending September 30, 1994, and for other purposes, namely:

* * *

Health Care Financing Administration

GRANTS TO STATES FOR MEDICAID

For carrying out, except as otherwise provided, titles XI and XIX of the Social Security Act, $64,477,413,000, to remain available until expended.

For making, after May 31, 1994, payments to States under title XIX of the Social Security Act for the last quarter of fiscal year 1994 for unanticipated costs, incurred for the current fiscal year, such sums as may be necessary.

For making payments to States under title XIX of the Social Security Act for the first quarter of fiscal year 1995, $26,600,000,000 to remain available until expended. Public Law 103-112; 107 Stats 1089, 1095.

72. Public Law 103-112 is an Appropriation Act, making appropriations to the Department of Health and Human Services for the Federal Fiscal Year ending September 30, 1994, and portions of the Federal Fiscal Year 1995, of funds required to be expended for support of federal financial participation in implementation of the Medicaid Program as required by law. Appropriations to the Department in the amounts set forth above include

authorization to the Secretary to expend funds for reimbursement to the State of California for those costs described in 42 U.S.C. § 1396b and § 1396d, as set forth above. Similar appropriations are enacted to annually fund the Medicaid Program.

73. Plaintiff State of California claims reimbursement for costs incurred by the State of California for the costs of emergency health care provided by the State from the appropriation made to the Department of Health and Human Services for the Federal Fiscal Year ending September 30, 1994, by Public Law 103-112, and from any appropriations subsequently to fund the Medicaid Program.

74. Plaintiffs contend that the costs of emergency services provided by the State of California to OBRA 86 Aliens pursuant to the mandatory provisions of 42 U.S.C. § 1396b (v) are to be reimbursed to the State of California at 100 percent of cost and are reimbursable from the appropriation set forth in Public Law No. 103-112, and similar subsequent appropriations, and have made claim to the HHS Secretary and Administrator for such reimbursement. The HHS Secretary and Administrator contend that the appropriation for such reimbursement is limited to the Federal medical assistance percentage determined pursuant the provisions of 42 U.S.C. 1301 (a) (8) (B) and has refused, and continues to refuse, to make funds available to the State of California for full reimbursement to the State of California for the costs of providing emergency health services to OBRA 86 Aliens.

75. To the extent that the provisions of 42 U.S.C. § 1396b and 42 U.S.C. § 1396d, or any other provisions of

law, are construed by the United States, or any defendants in this action, and applied to the State of California to prevent the expenditure of appropriated funds of the United States to the State of California as reimbursement for the full cost of providing emergency medical services to OBRA 86 Aliens, such provisions are in conflict with the provisions of Article IV, § 4 and the Tenth Amendment of the Constitution of the United States, and cannot be applied to the State of California.

76. On December 7, 1992, the HHS Secretary, acting pursuant to 42 U.S.C. 1301 (a) (8) (B), promulgated the federal medical assistance percentage applicable to the California State Plan for medical assistance, for the 1993-94 Federal Fiscal Year, to be 50 percent of the total amount expended by the State of California as medical assistance under the State Plan. 57 Fed. Reg. 57837 (1992).

77. On December 20, 1993, the HHS Secretary, acting pursuant to 42 U.S.C. 1301 (a) (8) (B), promulgated the federal medical assistance percentage applicable to the California State Plan for medical assistance, for the 1994-95 Federal Fiscal Year, to be 50 percent of the total amount expended by the State of California as medical assistance under the State Plan. 58 Fed. Reg. 66863 (1993).

78. To the extent that the federal medical assistance percentage promulgated by the HHS Secretary pursuant to the provisions of 42 U.S.C. § 1301 (a)(8)(B), or any other provisions of law, are construed by the United States, or defendants in this action, and applied to the State of California to prevent the expenditure of appropriated funds of the United States to State of California as reimbursement for the full cost of providing emergency

medical services to OBRA 86 Aliens, such action is in conflict with the provisions of Article IV, section 4, and the Tenth Amendment of the Constitution of the United States, and cannot be applied to the State of California.

79. At all times relevant to the facts alleged in this complaint, the State of California has provided emergency health care to OBRA 86 Aliens in implementation of the immigration policy of the United States and, absent order of this Court, will be required by federal law to continue to provide emergency health care to OBRA 86 Aliens in implementation of the immigration policy of the United States for so long as OBRA 86 (42 U.S.C. § 1396b (v), may be applied by the United States to the State of California.

80. As a result of the failure of defendants to reimburse the State of California for the full costs of providing emergency health care to OBRA 86 Aliens, and the inability of the government of the United States to control its international borders to prevent the illegal entry of OBRA 86 aliens, the State of California is forced to carry a significant and increasingly disproportionate financial burden of federal immigration policy.

81. The State of California, to further the immigration policy of the United States, and to share the cost of providing emergency services to OBRA 86 Aliens as required by federal law, has been required to appropriate and expend funds raised by the State of California pursuant to existing state laws.

82. The People of the State of California, exercising their constitutional right of the initiative, have placed into the California Constitution limits on the amount of

funds that can be appropriated by the State Legislature and local legislative bodies (Cal. Const. art. XIIIB) and the amount of some types of taxes that can be raised by the government. They have provided limited procedures for enacting tax increases (Cal. Const. arts. XIII and XIIIA) and have required minimum funding levels for education (Cal. Const. art. XVI, §§ 8 and 8.5), which is entitled to first call on the State General Fund (Cal. Const. art. XIV, § 8(a).

83. Operating within the limitations placed on the Legislature by the State Constitution, the State of California was required to forego appropriation of funds for other purposes and was restricted in the exercise of its sovereign authority to spend tax funds raised for the general welfare of its residents because it was required to appropriate money raised pursuant to its taxing authority to provide health care to approximately 309,100 OBRA 86 Aliens in State Fiscal Year 1993-94 in implementation of Federal immigration policy.

84. During California Fiscal Years 1991-92, 1992-93, 1993-94, 1994-95, and at times when the defendants United States, Attorney General and Director of the Office of Management and Budget refused to reimburse the State of California, as required by law, for the full cost of providing emergency health care to OBRA 86 Aliens, the State of California has been required to cope with a severe financial crisis, its most severe since the Depression of the 1930s. During that period, it has been required to reduce funding for many State programs and activities and to increase fees and taxes to operate and maintain existing State services. During those fiscal years, the State

of California was required to issue registered warrants[3] for its General Fund obligations because it lacked sufficient cash in the State General Fund to issue warrants in the ordinary course. The State of California has been required to issue Revenue Anticipation Warrants to meet current obligations because at times it lacked sufficient cash in the General Fund to meet its current obligations.

85. In California, the budget is the single most important policy document undertaken by government. Given the scope of contemporary governmental activity and the practical and political limits on raising state revenues, California budgeting is essentially a "zero-sum" in result. The State Constitution prohibits deficit budgeting. Money used for one purpose – such as providing emergency health care to OBRA 86 Aliens – is not available for other priorities.

86. The United States has, by failing to reimburse the State of California the full cost of providing emergency health care to OBRA 86 Aliens, and by enacting other laws or implementing other policies claimed by it to limit the right of the State of California to such reimbursement, required that State taxes be raised, that State funds be expended, that State statutes be enacted and implemented – all to further the interests of the United States and the immigration policies adopted by it. In essence, the State Legislature has been "commandeered" by the United States to execute and implement federal immigration policy. By its immigration policy and the

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[3] A Warrant is an order to pay from the State Treasury, and is the functional equivalent of a "check" in most circumstances.

requirement to provide emergency health care to OBRA 86 Aliens, the United States and defendants have prevented the State of California from exercising its sovereign right to expend funds to further the policies and interests of its citizens as determined by the people of the State of California and their elected representatives, acting pursuant to the California Constitution.

87. The immigration policies of the United States, as implemented by defendants, have invaded the Sovereignty of the State of California and violated those rights possessed by the State of California through the Tenth Amendment of the United States Constitution and violated the right of the State of California to a republican form of government guaranteed to the State of California by Article IV, section 4 of that Constitution.

88. The United States, and defendants, by failing to reimburse the State of California in full for the full costs of providing emergency health care to OBRA 86 Aliens, and, the United States, by enacting other laws or implementing other policies claimed by it to limit the right of the State of California to such reimbursement, has limited and avoided responsibility to its voters for the cost impact of the immigration policies it has implemented. By requiring the State of California to share the cost of providing emergency health care to OBRA 86 Aliens in the State of California, the true cost impact of the immigration policy of the United States is hidden from the voters who elected those responsible for the enactment and implementation of such policy.

89. The State of California has no remedy through the political process established by the Constitution of

the United States to relieve the failure of defendants to reimburse the State of California for full costs of providing emergency health care to OBRA 86 Aliens. Despite demands made to all appropriate federal officials and requests made to the Congress of the United States and those senators and representatives elected by the people of the State of California to represent them in that Congress and the actions taken by those senators and representatives in support of those requests, no relief has been provided to the State of California.

90. The State of California has exhausted all other political and practical remedies, and any remedy provided by law, to obtain reimbursement from the United States and has no other recourse but to seek judicial relief and orders from this Court declaring the right of the State of California to such reimbursement under federal law, and the exercise of equitable jurisdiction of this Court implementing such determination, and declaring that any law or policy of the United States that prevents reimbursement is void and in conflict with Article IV, section 4, and the Tenth Amendment of the United States Constitution.

91. The State of California requests this Court exercise its equitable jurisdiction to remedy the violation of the Tenth Amendment of the United States Constitution by the United States, and to guarantee a republican form of the Government to the State of California.

92. The State of California, to insure the continuation of a republican form of government within the State of California and to enforce its Tenth Amendment rights

against the United States, and in furtherance of the equitable jurisdiction of this Court, seeks equitable relief from this Court requiring the United States and defendants to pay to the State of California, from any funds of the United States subject to the equitable jurisdiction of this Court, the full costs of providing emergency health care to OBRA 86 aliens for California Fiscal Years 1991-92 through 1994-95, and continuing for so long as the United States violates the Tenth Amendment rights of the State of California and for so long as the immigration policies of the United States continue to violate the right of the State of California to a republican form of government as guaranteed by Article IV, section 4, of the United States Constitution.

93. The State of California, in furtherance of the equitable jurisdiction of this Court, to continue a republican form of government within the State of California and to enforce its Tenth Amendment rights against the United States and in furtherance of the equitable jurisdiction of this Court to encourage the apprehension and deportation of illegal aliens, also seeks equitable relief from this Court prohibiting the United States and defendants in this action, from enforcing any law enacted by the Congress of the United States, or any regulation enforced by defendants, which impedes the State of California and plaintiffs in this action, from determining the presence of illegal aliens within the State of California and from advising defendants of the presence of illegal immigrants within the State of California.

94. The State of California, in furtherance of the equitable jurisdiction of this Court, to continue a republican form of government within the State of California

and to enforce its Tenth Amendment rights against the United States, and in furtherance of the equitable jurisdiction of this Court, to encourage the apprehension and deportation of illegal aliens, also seeks equitable relief from this Court prohibiting the United States and defendants in this action from enforcing any law enacted by the Congress of the United States, or law or regulation enforced by defendants Attorney General, Commissioner and Director, from applying such laws to the State of California to prevent such reimbursement, and further seeks to mandate the Attorney General and the Director to take all necessary action to reimburse the State of California for such costs from any funds of the United States.

THIRD CLAIM FOR RELIEF

[Declaratory Relief]

FOR A THIRD CLAIM FOR RELIEF, Plaintiffs State of California, Pete Wilson, Joe G. Sandoval, James H. Gomez, and Francisco J. Alarcon allege as follows:

95. Plaintiffs reallege paragraphs 1 through 35 and paragraphs 39 and 40 of this complaint, inclusive, and, by this reference, incorporate the allegations of paragraphs 1 through 35 and paragraphs 39 and 40, herein.

96. On December 31, 1993, the California State Department of Corrections (CDC), among its 119,951 person inmate prison population, housed 23,096 inmates who listed foreign birthplaces. An additional 4,468 inmates were unable to provide proof of birth in the United States. The State Department of Corrections and

USINS estimate that approximately 16,700 of these inmates were subject to deportation and are illegal aliens as that term is included in 8 U.S.C. § 1365(a). For State Fiscal Year 1994-95, the CDC estimates that approximately 18,000 such inmates will be incarcerated in its facilities.

97. The costs to the State of California for the incarceration of inmates in prisons operated by the State Department of Corrections is approximately $21,000 per inmate per year.

98. Commencing with State Fiscal Year 1988-89, and continuing through State Fiscal Year 1994-95, the State of California has expended, or will expend $1,720,933,103 to incarcerate illegal alien felons convicted of California crimes in prisons operated by CDC, as follows:

Fiscal Year	Illegal Aliens Incarcerated In CDC Prisons	Cost
1988-89	5,581	$104,277,242
1989-90	6,668	132,514,804
1990-91	8,819	181,346,259
1991-92	12,898	269,914,194
1992-93	15,202	317,846,594
1993-94	16,673	342,205,792
1994-95(est)	17,958	372,828,218
	TOTAL:	$1,720,933,103

99. The State of California has incurred long-term financial obligations of approximately $1.6 billion to fund the construction of state prisons to house over 18,000 illegal alien felons. Each prison, designed to hold approximately 2,200 inmates, costs over $200 million to construct. There are enough undocumented immigrant felons

in California's correctional system today to virtually fill eight prisons at 100% of design capacity. The cost of prison construction to house illegal aliens is a cost incurred by the State for the imprisonment of illegal aliens convicted of a felony by the State of California.

100. The State of California is expending additional funds for parole supervision of illegal aliens not deported by the Immigration and Naturalization Service. Commencing with State Fiscal Year 1988-89, and continuing through State Fiscal Year 1994-5, the State of California has expended, or will expend $53,045,671 for CDC parole supervision of illegal alien felons not deported by USINS as follows:

Fiscal Year	Illegal Aliens Under CDC Parole Supervision	Cost
1988-89	1,385	$ 3,807,264
1989-90	1,618	4,316,371
1990-91	2,392	5,704,434
1991-92	3,913	9,023,527
1992-93	4,526	9,464,897
1993-94	4,515	9,626,709
1994-95(est)	4,889	11,102,469
	TOTAL:	$53,045,671

Commencing with State Fiscal Year 1988-89, and continuing through State Fiscal Year 1994-5, the State of California has expended, or will expend $6,700,000 for DYA parole supervision of illegal alien youthful offenders not deported by USINS as follows:

Fiscal Year	Illegal Aliens Under DYA Parole Supervision	Cost
1988-89	183	$700,000
1989-90	216	900,000
1990-91	226	1,100,000
1991-92	224	800,000
1992-93	245	1,000,000
1993-94	265	1,100,000
1994-95(est)	277	1,100,000
	TOTAL:	$6,700,000

101. The costs of imprisonment of illegal aliens convicted of California felonies will increase because of the recent enactment of changes in sentences for repeat offenders – the "Three Strikes and You're Out" legislation. Chapter 12, Statutes of 1994 – Assembly Bill 971. The "Three Strikes" law will increase sentences for many felons, including illegal aliens, thereby adding a substantial, but unknown cost to the State of California for incarcerating illegal aliens in the State's prisons.

102. The State of California has expended funds for the incarceration of illegal alien youthful offenders. Illegal immigrant youths who had been convicted of a felony, as that term is utilized in the Immigration Reform and Control Act of 1986 (Pub L. 99-603, Title V, § 501, Nov. 6, 1986, 100 Stat. 3443; 8 U.S.C. 1365 (a)) are housed in CYA institutions. The average cost to the State of California to house each ward for one year is approximately $32,500. Commencing with State Fiscal Year 1988-89, and continuing through State Fiscal Year 1994-5, the State of California has expended, or will expend $184,800,000 to incarcerate illegal alien youthful offenders in prisons operated by CYA as follows:

Fiscal Year	Illegal Aliens Incarcerated in DYA Institutions	Cost
1988-89	734	$ 16,800,000
1989-90	717	19,900,000
1990-91	787	23,000,000
1991-92	849	27,100,000
1992-93	972	29,500,000
1993-94	1056	33,400,000
1994-95 (est)	1079	35,100,000
	TOTAL:	$ 184,800,000

103. The State of California, in order to fund the costs of incarceration of illegal aliens convicted of felonies, including the costs of construction and operation of sufficient prisons to house 18,000 adult prisoners and 1,079 youthful offenders, and to operate sufficient courts and law enforcement personnel to absorb disposition of felony convictions, has been required to appropriate and expend $1,471,112,400 raised by the State of California pursuant to existing state laws.

104. Operating within the limitations placed on the Legislature by the State Constitution, the State of California was required to forego appropriation of funds for other purposes and was restricted in the exercise of its sovereign authority to spend tax funds raised for the general welfare of its residents because it was required to appropriate money raised pursuant to its taxing authority to house 18,000 adult illegal alien felons and 1,079 illegal alien youthful offenders and to supervise parole of approximately 5,200 illegal aliens supervised by CDC and CYA, who have not been deported.

105. In 1986, the United States Congress enacted the Immigration Reform and Control Act of 1986. That Act

provides that the Attorney General shall reimburse the State of California for costs incurred for the imprisonment of any illegal alien who is convicted of a felony by the State of California. 8 U.S.C. § 1365(a), 100 Stat. 3443, Pub. L. 99-603. In that Act, Congress also authorized the appropriation of such sums as are necessary to reimburse the State of California for such costs. 8 U.S.C. § 1365(b).

106. At all times relevant to facts alleged in this complaint, the Immigration and Reform and Control Act of 1986 provided as follows:

> (a) Subject to the amounts provided in advance in appropriation Acts, the Attorney General shall reimburse a State for costs incurred by the State for the imprisonment of any illegal alien or Cuban national who is convicted of a felony by such State.
>
> .....
>
> (d) There are authorized to be appropriated such sums as are necessary to carry out the purposes of this section. (8 U.S.C. § 1365)

107. At all times relevant to the facts alleged in this complaint, Public Law 103-121 provided an appropriation from the United States Treasury to the Attorney General in the amount of $1,048,538,000, to be expended during the fiscal year ending September 30, 1994, for expenses necessary for the administration and enforcement of laws relating to immigration, naturalization and alien registration, and provided that the appropriation is to be accounted for solely under the certificate of the Attorney General. Congressional & Administrative News, 103rd Congress, 1st Session, Public Law 103-121, 107 Stat. 1153, 1160.

108. Public Law 103-121 is an Appropriation Act, making appropriations to the Department of Justice for the fiscal year ending September 30, 1994. The appropriation to the Department of Justice in the amount of $1,048,538,000 includes authorization to the Attorney General to expend funds for reimbursement to the State of California for those costs described in 8 U.S.C. § 1365 (a), as set forth above. Reimbursement for the costs incurred by the State of California for the imprisonment of illegal aliens convicted of a felony by the State of California, and its expenses, not otherwise provided for, is necessary for the administration and enforcement of laws relating to immigration, naturalization and alien registration as those terms are used in 8 U.S.C. § 1365 (a).

109. In 1990, Congress amended the Immigration and Nationality Act to increase various civil fines and forfeitures for violations of immigration laws. The amendment permitted the increased penalties to be used as a continuing appropriation to support activities enhancing the enforcement of the immigration laws, including the identification, investigation, and apprehension of criminal aliens. 8 U.S.C. § 1330(b), 104 Stat. 5057, Pub. L. 101-649.

110. On August 26, 1994, after the filing of the complaint in this action, Congress enacted an appropriation purporting to implement the provisions of 8 U.S.C. 1365. Specifically, $130,000,000 has been appropriated to the Attorney General for expenditure to states to reimburse the states for the cost of incarcerating illegal alien felons. Title VIII, 103 P.L. 317; 108 Stat. 1724. That appropriation is to be distributed to states required to incarcerate illegal alien felons beginning October 1, 1994, and after the

Attorney General has adopted regulations establishing a distribution formula. As of the date of the filing of this amended complaint, no such regulations have been adopted. This appropriation requires the Attorney General to distribute one-third of the appropriated amount not later than 120 days after the start of the Federal Fiscal Year. The remaining amounts require submittal of application by qualified states prior to September 30, 1995 and cannot be distributed until state plans have been approved. This appropriation does not provide full federal reimbursement to the State of California for the cost of incarcerating illegal felons nor does it fully implement the provisions of 8 U.S.C. 1365.

111. On September 16, 1994, the President of the United States signed into law the "Violent Crime Control and Law Enforcement Act of 1994", commonly called the "1994 Crime Bill", as Public Law 103-122. The full text of the 1994 Crime Bill is set out in the Conference Report to accompany H.R. 3355, House Report 103-711, 103d Congress, 2d Session, and 55 CrL 2305. As of the date of filing this amended complaint, the 1994 Crime Bill provides no remedy to the State of California to cure the failure of the United States to reimburse the State of California for the cost of incarcerating illegal aliens.

112. The 1994 Crime Bill, in Subtitle C to Title II, authorizes the Attorney General to make "contractual arrangements" for compensation to individual states for the costs of incarceration of undocumented criminal aliens, if an application is made and the application meets certain conditions and priorities, and limits reimbursement to formulas that do not provide reimbursement in full. Conference Report, at 30. 55 CrL 2315. This Bill does

not require the Attorney General to provide to the State of California full reimbursement for the cost of incarcerating illegal aliens, or any reimbursement whatsoever.

113. The 1994 Crime Bill follows the pattern of prior Federal Action concerning reimbursement for the cost of incarcerating illegal aliens. It contains an "authorization" for future appropriations, but makes no appropriations for its purposes. Section 20301, provides:

"AUTHORIZATION FOR APPROPRIATIONS.

"There are authorized to be appropriated to carry out this subtitle –

(1) $130,000,000 for fiscal year 1995;
(2) $300,000,000 for fiscal year 1996;
(3) $330,000,000 for fiscal year 1997;
(4) $350,000,000 for fiscal year 1998;
(5) $350,000,000 for fiscal year 1999;
(6) $340,000,000 for fiscal year 2000."

114. The amounts "authorized for appropriation" in the 1994 Crime Bill are inadequate to fully reimburse the State of California for its expenditures to pay the cost of incarceration of illegal alien felons, past present or future.

115. As of the date of the filing this amended complaint other than the appropriation in 103 P.L. 317, no specific appropriation has been made by the Congress, and the United States and its Attorney General have construed federal law to require a specific appropriation before the 1994 Crime Bill can be implemented.

116. Plaintiff State of California claims reimbursement for costs incurred by the State of California for imprisonment of illegal aliens convicted of felonies by the

State from the appropriation made to the Department of Justice for the fiscal year ending September 30, 1994, by Public Law 103-121, from any additional funds made available for expenditure pursuant to the implementation of 8 U.S.C. § 1330 by the Attorney General, Commissioner or Director, and from any other similar appropriation to the Attorney General for subsequent fiscal years, such as that contained in Public Law 103-317 for the Federal Fiscal Year commencing October 1, 1984. 108 Statute 1724.

117. Plaintiffs contend that the costs of imprisonment of illegal aliens are reimbursable from the appropriation set forth in Public Law 103-121, the additional funds made available pursuant to 8 U.S.C. § 1330, and any other similar appropriation for subsequent fiscal years, and have made claim to the Attorney General for such reimbursement. The Attorney General contends that there is no appropriation for such reimbursement and further contends that the appropriation set forth in Public Law 103-121, the additional funds made available pursuant to 8 U.S.C. § 1330, and any other similar appropriations, are not available for such purpose and has refused, and for those reasons, continues to refuse, to make funds available to the State of California. Plaintiffs allege that such funds are available and that defendants Attorney General and Commissioner have abused their discretion in assuming that such funds were not available to be expended for such purpose.

118. An actual controversy exists between plaintiffs and defendants over whether the Attorney General is required to make funds available to the State of California pursuant to its claim from appropriations made by Public

Law 103-121, 8 U.S.C. § 1330, or any other similar appropriation. Defendants deny such claim and contend that such funds are not available for such purpose.

119. Plaintiffs seek a declaration from this Court that appropriations contained within Public Law 103-121 and 8 U.S.C. § 1330 and any other similar appropriation for subsequent fiscal years authorize the Attorney General to expend funds for the purpose of reimbursement to the State of California for the costs of imprisonment of illegal aliens as authorized and approved by Congress in Public Law 99-603 (8 U.S.C. § 1365(b), 100 Stat. 3443), and an order from this Court mandating the Attorney General to exercise that discretion authorized by law consistent with that declaration and further mandating the Attorney General and the Director to implement the provisions of 8 U.S.C. § 1365 (d) from said appropriations, and to enjoin the Attorney General and Director from implementing any statute or policy that limits or prevents the exercise of discretion by the Attorney General to expend said appropriations as declared by this Court.

120. The State of California has exhausted all other political and practical remedies, and any remedy provided by law, to obtain reimbursement from the United States and has no other recourse but to seek judicial relief and orders from this Court declaring the right of the State of California to such reimbursement under federal law, and the exercise of equitable jurisdiction of this Court implementing such determination.

FIFTH CLAIM FOR RELIEF

[DECLARATORY RELIEF]

FOR A FIFTH CLAIM FOR RELIEF, Plaintiffs State of California, Pete Wilson, Joe G. Sandoval, James H. Gomez, and Francisco J. Alarcon allege as follows:

121. Plaintiffs reallege paragraphs 1 through 35 and paragraphs 39 and 40 of this complaint, inclusive, and, by this reference, incorporate the allegations of paragraphs 1 through 39 and paragraphs 39 and 40, herein.

122. Defendants Commissioner and Attorney General have failed to comply with statutory duties imposed upon them by law to conduct deportation proceedings immediately following the conviction of aliens eligible for deportation.

123. As of October 31, 1993, there were 12,435 inmates in the custody of the California Department of Corrections with an actual detainer, or hold, requested by the United States Immigration and Naturalization Service (USINS). In addition, on that date, there were 6,372 inmates potentially subject to a USINS hold, of which approximately 65% (4,142) will end up actually having a hold placed by the USINS. In calendar year 1993, in well over half the cases where there was a parole of an inmate with an active USINS hold, deportation proceedings were not conducted until after the release of the inmate-alien from custody, if they were conducted at all.

124. In 1986 Congress passed the Immigration Reform and Control Act which, among other things, mandates that the Attorney General begin deportation proceedings against aliens convicted of criminal offenses that

would make them subject to deportation "as expeditiously as possible after the date of the conviction." 8 U.S.C. § 1252(i).

Subdivision (i) of section 1252 states that:

> [I]n the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General *shall begin* any deportation proceeding as expeditiously as possible after the date of conviction. (Emphasis added.)

125. Congress intended that these proceedings would begin "when there is a conviction," not upon release from confinement. 132 Cong. Rec. H9794. The purpose of this requirement is to benefit the State of California by reducing the cost of incarceration of convicted illegal alien felons and to reduce overcrowding within state prisons.

126. The USINS, by policy adopted and implemented by the Commissioner, does not begin the required proceedings until alien inmates subject to a deportation proceeding are at or near their time of release, in violation of 8 U.S.C. § 1252(i). By adopting and implementing such a policy, the Defendant Commissioner has failed to carry out those duties imposed upon her by law, to the detriment of the Plaintiff State of California. By adopting a policy that delays the conduct of deportation proceedings until just before release, the Defendant Commissioner fails to achieve the purposes sought to be achieved by Congress by enacting that requirement.

127. It is the policy of the USINS to conduct interviews and process those undocumented immigrant

inmates at California Department of Corrections' institutions with the *most imminent release date,* regardless of the date of conviction. The most imminent release date is within 24 months of scheduled release. Plaintiffs are informed and believe that USINS/Border Patrol agents are not interviewing inmates that have six or more months left to serve on their state prison terms.

128. By failing to comply with the statutory requirement, the USINS is causing the release of convicted alien felons from State custody into California communities that would otherwise be processed to deportation proceedings. During State Fiscal Year 1994-95 there are approximately 4,900 undocumented aliens (average daily population) on active CDC parole who should have been deported but were not as a result of the USINS's failure to conduct deportation proceedings or to implement actual deportation.

129. The cost to supervise a CDC parolee is approximately $2,271 a year, per parolee. An additional 6,515 parolees were on "inactive" parole, having actually been deported. The record-keeping costs for each parolee, along with periodic status checks, is approximately $179 per year. As a result, the people of California carry an additional financial burden for CDC parole supervision costs of approximately $12.3 million dollars yearly, which the United States has failed to reimburse to the State of California. This expenditure results from the federal government's failure to expeditiously process and deport undocumented aliens.

130. During State Fiscal Year 1994-95, the California Department of Youth Authority has approximately 277

undocumented alien youthful offenders (average daily population) on active parole who were subject to deportation.

131. The cost to the State of California to supervise CYA parolees is approximately $4,041 a year, per parolee. As a result, the people of California carry an additional financial burden for CYA supervision costs of approximately $1.1 million yearly, which the federal government failed to reimburse to the State of California. This expenditure results from the federal government's failure to expeditiously process and deport undocumented aliens.

132. It is the intent of Congress that aliens be deported immediately upon the completion of their sentence. The current policy of the USINS is directly contrary to this intent, resulting in significant cost to the State of California.

133. Notwithstanding the clear meaning of the statute and the expressed intent of Congress, and damage to the State of California, the USINS continues to disregard the requirement to initiate proceedings "as expeditiously as possible" so that deportation may occur upon completion of sentence.

134. The Commissioner has abused the discretion delegated to her by the Attorney General and Congress of the United States, and has abdicated her statutory responsibilities, by failing to implement the provisions of 8 U.S.C. § 1252 (i).

135. There is an actual controversy between plaintiffs and defendants as to whether the policy and inaction

of the Commissioner and the USINS is lawful and conforms to the provisions of 8 U.S.C. § 1252 (i). Plaintiffs contend it does not. Defendant Commissioner contends it does.

136. Plaintiffs seek a declaration from this Court that Defendant Commissioner has a duty to begin deportation proceedings for all inmates subject to deportation as expeditiously as possible after the date of conviction under the provisions of 8 U.S.C. § 1252 (i) and an order from this Court mandating the Defendant Commissioner to conduct deportation proceedings in that manner and to enjoin the Defendant Commissioner from implementing a policy that limits the initiation of deportation proceedings until completion of sentence, or shortly prior thereto.

SIXTH CLAIM FOR RELIEF

[DECLARATORY RELIEF]

FOR A SIXTH CLAIM FOR RELIEF, Plaintiffs State of California, Pete Wilson, Joe G. Sandoval, James H. Gomez, and Francisco J. Alarcon allege as follows:

137. Plaintiffs reallege paragraphs 1 through 35 and paragraphs 39 and 40 of this complaint, inclusive, and, by this reference, incorporate the allegations of paragraphs 1 through 35 and paragraphs 39 and 40, herein.

138. Defendant Attorney General and Commissioner have failed to take into custody alien inmates released from confinement at the conclusion of their imprisonment and hold such aliens pending determination of deportability and have instead released said aliens

into the community to the detriment of the State of California and the endangerment of its residents. The actions of the Attorney General and the Commissioner occurred during the calendar years 1993 and 1994 and are continuing.

139. The Attorney General and Commissioner are required by law to take into custody those aliens convicted of aggravated felonies and hold such aliens in custody pending resolution of deportability and are authorized by law to take into custody aliens released from confinement and to hold such aliens pending determination of deportability. 8 U.S.C. § 1252.

140. The Attorney General and Commissioner have adopted a practice of not taking into custody those aliens inmates with known serious medical and psychiatric conditions, including those illegal aliens with diagnosed or known infectious diseases such as HIV and tuberculosis, life-threatening medical or other conditions, or those illegal aliens wherein surgery may be required in the immediate future.

141. The practice of excluding alien inmates by category and the failure to take alien inmates into custody at the conclusion of their sentencing pending deportablity violates the provisions of 8 U.S.C. § 1252 and is an abdication of statutory responsibilities and an abuse of the authority delegated to the Attorney General and the Commissioner by the President and Congress of the United States to administer the immigration laws of the United States.

142. The California State Department of Corrections, to assist the USINS and the Commissioner, provides detailed documentary records and information to USINS relative to an inmate's status in the United States and factors which may have an impact on conditions of release, including known serious medical and psychiatric conditions, including contagious and infectious diseases such as HIV and tuberculosis, life-threatening problems, and required surgery categories.

143. Plaintiffs are informed and believe, and on that basis allege, that USINS policy provides that a USINS Agent who encounters an incarcerated undocumented immigrant amenable to deportation, but with a known serious medical, physical or psychological problem, is prohibited from considering medical condition or costs as the determining factor as to the placement or removal of a USINS detainer.

144. Notwithstanding the requirement that the USINS take into custody all convicted aggravated felons, who have been unlawfully admitted into the United States, USINS agents have dropped or failed to place USINS detainers on inmates who have serious medical conditions.

145. In an effort to assist the California Department of Corrections and the USINS, and relieve some of the burden of this ever-expanding population, the CDC implemented a program dealing with the identification and processing of inmates who may be subject to deportation proceedings by the USINS.

146. This program instituted an aggressive and expeditious identification of undocumented immigrant

inmates who may be subject to deportation. Upon CDC intake, each inmate's Central file is reviewed by Correctional Counselors and other staff. Correctional counselors and case records staff audit Central files and interview all incoming inmates (including newly sentenced offenders as well as parolees returned to custody for parole violations or convictions for new crimes) in an effort to identify all foreign-born inmates. Those inmates identified as foreign born are referred to a case records specialist who logs and compiles the information for referral to USINS. A follow-up review is also conducted and documented to determine the disposition of each case, whether a possible hold will be implemented, or specific reason why an inmate is not deportable. At the inmate's initial classification review and at all pre-parole and 60-day and 10-day audits, a rigorous check and balance system is implemented to ensure that all undocumented immigrant inmates have been identified and reported to USINS, and that the CDC and USINS have fulfilled all responsibilities in a complete and timely manner.

147. The State Department of Corrections also provides monthly computerized printouts to USINS listing all foreign-born inmates committed to the CDC with actual USINS detainers and potential holds. These listings reflect each inmate's name, State Department of Corrections number, actual or potential USINS detainer and the inmate's current location, in release-date order.

148. If a USINS detainer has been placed, federal law requires that the inmate must be picked up by the USINS authorities no later than 48 hours beyond the official release date. 8 C.F.R. § 287.7(a)(4). The inmate must be released on parole to the community if not

picked up within 48 hours of the release date and is entitled to release funds.

149. While the USINS requires the states to detain the undocumented aliens for up to 48 hours, their regulations provide that the federal government is not to bear any financial obligation as a result of the State of California holding the alien. 8 C.F.R. § 287.7(a)(5). Accordingly, the United States has placed a direct financial burden on the states to implement federal policy without any provision for compensation.

150. If USINS notifies the State Department of Corrections' records office that the inmate will not be picked up within the required time, the records specialist will document the name, USINS branch and telephone number of the person providing notice, and request that a teletype be forwarded by USINS, officially removing the detainer prior to the release date. During calendar year 1993 and 1994, and continuing, the USINS, in a number of cases, has refused to send the institution any information in writing verifying that they are refusing to pick up a deportable undocumented alien felon. Procedures of the Department of Corrections require every effort be made, including a Letter of Inquiry and telephone contact, to notify USINS of the need for detainer determination. Documented efforts are required to be included in the inmate's central file.

151. Notwithstanding the information provided by the State of California, through its Department of Corrections, to the USINS, the USINS has abdicated statutory responsibilities and has failed, and continuously fails, to comply with its duties under statute and regulation to

take released aliens into custody pending final determination of deportability, which results in such persons being released into the community, to the detriment of the State of California.

152. There is an actual controversy between plaintiffs and defendants as to the policy of the Commissioner whether her duties under 8 U.S.C. § 1252 are being abdicated or lawfully implemented.

153. Plaintiffs seek a declaration from this Court that Defendant Commissioner has a duty to take into custody those alien inmates who have completed their sentence and are pending final determination of deportability and further seek an order from this Court mandating the Defendant Commissioner to take such aliens into custody, and further seek to enjoin the Defendant Commissioner from implementing a policy that limits the circumstances by which aliens are taken into custody.

SEVENTH CLAIM FOR RELIEF

[Declaratory Relief]

FOR A SEVENTH CLAIM FOR RELIEF, Plaintiffs State of California, Pete Wilson, Joe G. Sandoval, James H. Gomez, and Francisco J. Alarcon allege as follows:

154. Plaintiffs reallege paragraphs 1 through 35 and paragraphs 39 and 40, inclusive, and, by this reference, incorporate the allegations of paragraphs 1 through 35 and paragraphs 39 and 40, herein.

155. Alien felons who re-enter the United States illegally following a deportation order violate the provisions of 8 U.S.C. § 1326 and are subject to federal

imprisonment for up to 2 or up to 15 years upon conviction.

156. United States Immigration and Naturalization Service Border Patrol agents currently monitor approximately 2,000 miles of the southern United States border. Between October 1991 and September 1992, approximately 1.2 million undocumented immigrants were apprehended by persons acting under the authority of the United States. Almost half of these apprehensions, approximately 565,000, occurred along the Tijuana-San Diego border: a 14-mile section of border between California and Mexico. The total number of apprehensions along California's entire border with Mexico amounted to over 618,000. An additional 71,000 apprehensions occurred along the Tucson, Arixona, border region. Many of the persons crossing the United States/Mexico border in Arizona are destined for California. The USINS estimates that it is successful in apprehending only about half of the undocumented immigrants that attempt to enter the United States illegally.

157. The practice of border crossing has in many ways developed into a game of "hide-and-seek". Each day hundreds of people begin massing along California's border with Mexico. The participants include those seeking illegal entry into the United States and those individuals whose objective is to merely divert the border patrol agents' attention. As darkness descends, the border crossings intensify. Those individuals caught entering this country, regardless of their motive, are typically detained for a relatively short period of time, usually a matter of hours, before being released back into Mexican territory. With little to lose, the scenario often repeats itself and the

"hide-and-seek" game continues, with those caught now wiser from their experience.

158. Given California's proximity to Mexico, the USINS practice of border deportation releases has had a significant negative effect on California. As a result of geographic proximity and the federal government's inability to control the border, California is by far the most heavily impacted state in the nation.

159. Deportees are returning to California in significant numbers. The result is a high rate of re-arrest or contact with the California Department of Corrections' Parole and Community Services Division (P&CSD). Approximately 1,375 inmates with USINS detainers, who were paroled in 1990 and deported, returned to the United States by virtue of their arrest or contact with P&CSD as of December 31, 1993. With 3,711 inmates having been paroled to USINS custody in 1990 and deported, the 1,375 returnees represent a return rate of approximately 37%. It is anticipated that this percentage will increase as the length of time since deportation increases. For example, for persons deported in 1989, statistics on the number of returning deportees reflect a return rate of approximately 46%.

160. California incurs a substantial amount of costs, both tangible and intangible, as a result of these undocumented immigrant felons returning to this State.

161. Deported cases are assigned to a P&CSD/USINS Unit that handles these cases. The cases in these units are supervised at a ratio of 500:1, as opposed to the standard supervision ratio of 53:1 used in regular California parole caseloads. The adjusted cost per case in USINS

units based on a 500:1 supervision ratio is approximately $179 per case. The average cost per parolee under active parole supervision is $2,271.

162. During State Fiscal Year 1994-95, the total average CDC parole population will be 92,943, not including parolees supervised from other states. It is estimated that for Fiscal Year 1994-95, the average daily population of parolees under active parole supervision with a USINS detainer will be 4,889. At a cost of $2,271 per parolee, this amounts to an estimated cost of over $11.1 million for the fiscal year. It is estimated that an additional 6,515 parolees will be under P&CSD's USINS Unit supervision. At a cost of $179 per parolee, this amounts to a cost of over $1 million for Fiscal Year 1994-95, brining the estimated total cost to CDC for parole supervision of illegal alien offenders with a USINS detainer to approximatley $12.3 million for Fiscal Year 1994-95.

163. Not included in the $12.3 million parole supervision cost are additional costs incurred by the CDC should one of these offenders be returned to custody in a state prison on a parole violation or upon conviction of a new offense. It costs approximately $21,000 per year to house an inmate in the State prison system. These dollar amounts refer only to the State's housing costs for imprisonment. It does not include prison bed construction costs. At 100% of design capacity, the State of California would require virtually eight prisons to house the approximately 18,000 illegal immigrant felons in its system. Each prison has cost approximately $200 million to construct and new prison construction is estimated to cost over $275 million per prison. State and local costs associated with arrest, prosecution, court proceedings,

and housing in county jails are not included in the costs listed above. Also, the tangible and intangible costs to victims of criminal activities are not included.

164. Undocumented aliens who illegally re-enter after having been formally deported are subject to prosecution for that re-entry under 8 U.S.C. § 1326. Persons convicted of violating 8 U.S.C. § 1326 are subject to imprisonment by the United States for periods ranging from up to two (2) or up to fifteen (15) years, the latter if deportation followed a conviction for an aggravated felony.

165. However, plaintiffs are informed and believe, and on that basis allege, that the United States and its Attorney General have abdicated their statutory responsibilities and instead have adopted policies and/or practice to initiate such proceedings only when the criminal alien is a serious repeat offender who has re-entered illegally numerous times and defendants have refused to exercise that discretion provided to them under law, to prosecute other violations of 8 U.S.C. § 1326. Such policies limit the prosecutorial discretion exercised by the four United States Attorneys acting as Federal prosecutors within the State of California.

166. By adopting a "no enforcement" or "limited enforcement" policy in the administration of 8 U.S.C. § 1326, the Attorney General has abdicated those responsibilities delegated by law to prosecute violations of 8 U.S.C. § 1326. By knowing that illegal alien felony offenders will again cross the border and become repeat offenders but failing to prosecute such action by deliberate policy, the Attorney General passes to the State of

California its law enforcement responsibility and requires the State of California to appropriate and expend funds raised pursuant to state powers of taxation for state purposes to support and implement the border and immigration policies of the United States and the Attorney General.

167. There is an actual controversy between plaintiffs and defendants as to the policy of the Attorney General concerning whether her duties under 8 U.S.C. § 1326 are being lawfully implemented.

168. Plaintiffs seek a declaration from this Court that Defendant Attorney General has a duty to prosecute those persons who violate deportation orders that are subject to prosecution under 8 U.S.C. § 1326 and has an affirmative duty to adopt policies for the administration of 8 U.S.C. § 1326 that do not abdicate to the State of California the costs of administering immigration policy sought to be protected by Congress in the enactment of 8 U.S.C. § 1326, and an order from this Court mandating the Attorney General to exercise that discretion vested in the Attorney General pursuant to law consistent with that declaration.

EIGHTH CLAIM FOR RELIEF

[Declaratory Relief]

FOR AN EIGHTH CLAIM FOR RELIEF, Plaintiffs State of California, Pete Wilson, Joe G. Sandoval, James H. Gomez, and Francisco J. Alarcon allege as follows:

169. Plaintiffs reallege paragraphs 1 through 35 and paragraphs 39 and 40, inclusive, and, by this reference,

incorporate the allegations of paragraphs 1 through 35 and paragraphs 39 and 40, herein.

170. The Attorney General has a mandatory duty under 8 U.S.C. § 1252(c) to execute a final order of deportation by effecting deportation of any person subject to such an order.

171. The Attorney General, the Commissioner, and those acting on their behalf, have implemented the duty imposed by 8 U.S.C. § 1252(c) by adopting a policy to transport persons whose country of origin is claimed by the deportee to be Mexico, or whose country of origin is believed to be Mexico, by transporting them to the border between Mexico and the United States and "dropping them off" at the border.

172. Plaintiffs are informed and believe and on that basis allege that defendants Attorney General and Commissioner are aware, and have knowledge, that the transportation of deportees to the border and release by "dropping them off at the border" is ineffective as deportation. Transportation of deportees to the border and release by "dropping them off at the border" does not constitute "deportation" as required by law. As alleged above, given California's proximity to Mexico, the practice of border deportation utilized by the Attorney General and Commissioner results in a significant number of deportees returning to California.

173. From time to time the Attorney General and the Commissioner have undertaken "experimental" or "pilot programs" to transport deportees to locations removed from the immediate border area. This type of

relocation is sometimes referred to as "interior repatriation". As an alternative to border deportation, it usually involves sending deportees close to their place of origin within Mexico, or to their last known permanent address, or to a community where there are believed to be family members. For example, in the fall of 1992, a pilot project was implemented by the USINS, in cooperation with the government of Mexico, to deport 300 undocumented immigrants into the interior of Mexico rather than releasing them at the border. By the fall of 1993, only a limited number returned to the United States, as demonstrated by contact with law enforcement officials. Significantly fewer deportees return to the State of California when "border drop-off" is not the method utilized to effect "deportation".

174. Plaintiffs are informed and believe and on that basis allege that the sole reason the USINS, implementing policies of the Attorney General and Commissioner, utilizes a "border drop-off" to execute an order of deportation, is cost savings to the United States. This policy has not been implemented after a finding by the Attorney General or the Commissioner that it furthers the immigration policy of the United States, or that it complies with those laws delegating implementation of federal immigration to the Attorney General and the Commissioner, but is recognized to pass the cost of implementing federal immigration policy to the State of California. By utilizing "border drop-off" policies, the Attorney General and the Commissioner have abdicated their responsibility to implement the requirements of 8 U.S.C. § 1252(c) and have transferred that responsibility to the State of California by requiring the State of California to utilize its law

enforcement processes and personnel to apprehend and incarcerate those deportees "dropped at the border," who return to the State of California. By such abdication the United States, the Attorney General and the Commissioner avoid the cost of more effective deportation procedures and avoid responsibility to Congress and to the voters for the full cost of the immigration policy of the United States and instead shift that cost and responsibility to the State of California.

175. There is an actual controversy between plaintiffs and defendants as to the policy of the Attorney General concerning the implementation of her duties under 8 U.S.C. § 1252(c) and whether these duties are being lawfully implemented.

176. Plaintiffs seek a declaration from this Court that Defendant Attorney General has a duty to adopt policies for the administration of 8 U.S.C. § 1252(c) that do not abdicate to the State of California the costs of administering immigration policy sought to be protected by Congress in the enactment of 8 U.S.C. § 1252(c) and further seek an order from this Court mandating the Defendant Attorney General to administer 8 U.S.C. § 1252(c) in such manner, and to expend appropriated funds consistent with the construction of the statute as declared by this Court, and to enjoin Defendant Attorney General from implementing a policy that allows "drop-off" border deportations for cost transfer and cost saving purposes.

NINTH CLAIM FOR RELIEF

[Tenth amendment, Article IV, Section 4, United States Constitution]

FOR A NINTH CLAIM FOR RELIEF, Plaintiffs State of California, Pete Wilson, and Russell S. Gould allege as follows:

177. Plaintiffs reallege paragraphs 1 through 35 and paragraphs 39 and 40, inclusive, and, by this reference, incorporate the allegations of paragraphs 1 through 35 and paragraphs 39 and 40, herein.

178. The number of aliens within the State of California and expenditure of funds by the State of California because of the presence of illegal aliens within the State of California is directly related to the failure of the United States and defendants Attorney General and Commissioner to administer the provisions of 8 U.S.C. §§ 1252(I), 1252(a)(2), 1326, 1252(c) and 1326, as required by federal law.

COSTS OF PUBLIC EDUCATION TO ILLEGAL IMMIGRANTS

179. The immigration policies of the United States as implemented by its Attorney General have resulted in an illegal resident population of 1.7 million people within the State of California, increasing at an annual rate of 125,000. The State of California has been required, in the implementation of federal immigration policy, to expend its funds for public primary and secondary education of illegal aliens. The United States, by such action, has violated the sovereignty of the State of California and those

rights possessed by the State of California through the Tenth Amendment of the United States Constitution.

180. As of the date of the filing of this amended complaint the State of California provides primary and secondary education to approximately 5.3 million children in approximately 7,000 pubic [sic] schools. Of that number there are approximately 308,000 undocumented aliens receiving a public education in public schools funded by the State of California. It is estimated that 41% of all undocumented aliens in the United States receiving primary and secondary education receive that education in schools funded by the State of California.

181. Commencing with State Fiscal Year 1991-92, and continuing through State Fiscal Year 1994-95, the State of California has expended, or will expend, $5,395,000,000 to provide public primary and secondary education to undocumented aliens as follows:

Fiscal Year	Undocumented Aliens Attending Primary and Secondary Schools	Cost
1991-92	240,579	$ 1,150,000,000
1992-93	262,901	1,293,000,000
1993-94 (est)	285,222	1,421,000,000
1994-95 (est)	307,543	1,531,000,000
	TOTAL:	$ 5,395,000,000

182. The State of California is prohibited by federal constitutional law from denying public primary and secondary education to undocumented aliens otherwise eligible to receive such education in public schools operated by the State of California and its education agencies.

183. This cost is on-going and will continue for so long as current federal immigration policies continue. It is estimated that in California Fiscal Year 1995-96 the State of California will be required to expend in excess of $ 1.5 billion to provide public primary and secondary education to undocumented aliens, and the State of California will be required to expend in excess of $1.5 billion annually for such purpose for so long as the United States continues to implement those immigration policies that allowed 1.7 million foreign nationals to unlawfully enter the State of California and to remain without deportation and permits that amount to increase by 125,000 annually.

184. The above estimates have been made by the State of California utilizing the best information available. However, there is no data available that provides an exact count of the number of undocumented aliens receiving public primary and secondary education in the State of California, as the State of California, and its education agencies, are prohibited from inquiring into the alienage of persons receiving public primary and secondary education, within the State of California. Because of such prohibitions neither the State of California, its education agencies, nor the United States can determine the precise number of undocumented aliens attending public primary and secondary schools, nor the amount of time they spend in school.

185. Plaintiffs contend that United States has a duty to reimburse the State of California for the costs of providing mandatory public primary and secondary education to undocumented aliens. The State of California has made claim to the President of the United States, and all

other appropriate federal officials, for such reimbursement, and such claims have been denied. The United States, and defendants Attorney General, Director and Education Secretary contend that the United States had no obligation to reimburse the State of California, and has construed existing federal law to deny such reimbursement.

186. The United States has enacted programs providing federal funds for certain qualified immigrant children, as a part of the Elementary and Secondary Education Act of 1965 (ESEA) (20 U.S.C. 2701 et seq.). The ESEA was originally enacted as Public Law 89-10, 79 Stat. 27, and has been amended many times since, including the addition of provisions authorizing funding for education of certain defined immigrants. 20 U.S.C. 2781, et seq. Public Law 100-297, 102 Stat. 176. The United States has appropriated funds annually to the Education Secretary to implement the provisions of the ESEA, as amended. None of the funds appropriated to implement the ESEA are available to the State of California to reimburse the State of California for costs expended by the State of California to provide primary and secondary education to undocumented aliens. The criteria established by the Education Secretary for distribution of the appropriated funds, and the eligibility criteria established by the Congress and regulations and policies of the Education Secretary which condition the availability of those funds, make them unavailable to the State of California to reimburse the State of California for costs expended by the State of California to provide primary and secondary education to undocumented aliens.

187. The State of California, in order to fund the costs of providing public primary and secondary education to 308,000 undocumented aliens, has been required to appropriate and expend funds raised by the State of California pursuant to existing state laws.

INCARCERATION COSTS FROM ILLEGAL IMMIGRANTS

188. As a result of federal immigration policy, the State of California has been required to expend its funds for the incarceration of those illegal aliens who commit felonies against the people of the State of California. In essence, the United States has "commandeered" the Legislature of the State of California to implement immigration policy of the United States. The United States, by such action, has violated the sovereignty of the State of California and those rights possessed by the State of California through the Tenth Amendment of the United States Constitution and Article IV, section 4 of that Constitution.

During the period 1991 through 1995, the State of California has expended, or will expend the $1,471,112,400 for the incarceration of illegal alien felons. Such costs have been expended as follows:

Commencing with State Fiscal Year 1991-92, and continuing through State Fiscal Year 1994-95, the State of California has expended, or will expend $1,302,794,798 to incarcerate illegal alien felons convicted of California crimes in prisons operated by CDC, as follows:

Fiscal Year	Illegal Aliens Incarcerated In CDC Prisons	Cost
1991-92	12,898	$ 269,914,194
1992-93	15,202	317,846,594
1993-94	16,673	342,205,792
1994-95 (est)	17,958	372,828,218
	TOTAL:	$1,302,794,798

Commencing with State Fiscal Year 1991-92, and continuing through State Fiscal Year 1994-95, the State of California has expended, or will expend $39,217,602 for CDC parole supervision of illegal alien felons not deported by USINS as follows:

Fiscal Year	Illegal Aliens Under CDC Parole Supervision	Cost
1991-92	3,913	$ 9,023,527
1992-93	4,526	9,464,897
1993-94	4,515	9,626,709
1994-95 (est)	4,889	11,102,469
	TOTAL:	$39,217,602

Commencing with State Fiscal Year 1991-92, and continuing through State Fiscal Year 1994-95, the State of California has expended, or will expend $4,000,000 for DYA parole supervision of illegal alien youthful offenders not deported by USINS as follows:

Fiscal Year	Illegal Aliens Under DYA Parole Supervision	Cost
1991-92	224	$ 800,000
1992-93	245	1,000,000
1993-94	265	1,100,000
1994-95 (est)	277	1,100,000
	TOTAL:	$4,000,000

Commencing with State Fiscal Year 1991-92, and continuing through State Fiscal Year 1994-95, the State of California has expended, or will expend $125,100,000 to incarcerate illegal alien youthful offenders in prisons operated by CYA as follows:

Fiscal Year	Illegal Aliens Incarcerated in DYA Institutions	Cost
1991-92	849	$ 27,100,000
1992-93	972	29,500,000
1993-94	1056	33,400,000
1994-95 (est)	1079	35,100,000
	TOTAL:	$125,100,000

189. The United States, by failing to reimburse the State of California, as required by 8 U.S.C. § 1365, and by enacting other laws or implementing other policies claimed by it to limit the right of the State of California to such reimbursement, has limited and avoided responsibility to its voters for the cost impact of the immigration policies it has implemented. By requiring the State of California to bear the cost of incarcerating those illegal aliens who have committed felonies in the State of California, and to bear the cost of providing public primary

and secondary education to undocumented aliens, the true cost impact of the immigration policy of the United States is hidden from the voters who elected those responsible for the enactment of such policy.

190. Operating within the limitations placed on the Legislature by the State Constitution, the State of California was required to forego appropriation of funds for other purposes and was restricted in the exercise of its sovereign authority to spend tax funds raised for the general welfare of its residents because it was required to appropriate money raised pursuant to its taxing authority to provide public primary and secondary education to undocumented aliens and to incarcerate illegal alien felons as alleged herein.

191. Because of the administration of its immigration policy, and the resulting need to provide public primary and secondary education to undocumented aliens, the United States has prevented the State of California from exercising its sovereign right to expend funds to further the policies and interests of its citizens as determined by the people of the State of California and their elected representatives, acting pursuant to the California Constitution.

192. The United States, by failing to reimburse the State of California, and by enacting other laws or implementing other policies claimed by it to limit the right of the State of California to such reimbursement, has limited and avoided responsibility to its voters for the cost impact of the immigration policies it has implemented. By requiring the State of California to provide primary and secondary education to undocumented aliens and to

bear the cost of incarcerating those illegal aliens who have committed felonies in the State of California, the true cost impact of the immigration policy of the United States is hidden from the voters who elected those responsible for the enactment of such policy. By requiring the State of California to raise taxes, appropriate funds and otherwise provide for the public primary and secondary education of undocumented aliens and the cost of incarcerating illegal alien felons, the United States has "commandeered" the Legislature of the State of California to execute and implement federal immigration policy and by such action has violated Tenth Amendment to the Constitution of the United States.

193. The State of California has no remedy through the political process established by the Constitution of the United States to relieve the failure of the United States to reimburse the State of California for the full costs of implementing federal immigration policy, including the costs of providing public primary and secondary education to undocumented aliens and the cost of incarcerating illegal alien felons. Despite demands made to the President of the United States, the Attorney General of the United States and the Education Secretary, and requests made to the Congress of the United States and those senators and representatives elected by the people of the State of California to represent them in that Congress, and the actions taken by those senators and representatives in support of those requests, no action has been taken to reimburse the State of California for such costs.

194. The State of California has exhausted all other political and practical remedies, and any remedy provided by law, to obtain reimbursement from the United States and has no other recourse but to seek judicial relief and orders from this Court declaring the right of the State of California to such reimbursement under federal law, and the exercise of equitable jurisdiction of this Court implementing such determination and declaring that any law or policy of the United States that prevents reimbursement is void and in conflict with Article IV, section 4, and the Tenth Amendment of the United States Constitution.

195. The State of California requests this Court exercise its equitable jurisdiction to remedy the violation of the Tenth Amendment of the United States Constitution by the United States and of the United States' guarantee to California of a republican form of the Government to the State of California.

196. The State of California, to insure the continuation of a republican form of government within the State of California and to enforce its Tenth Amendment rights against the United States, and in furtherance of the equitable jurisdiction of this Court, seeks equitable relief from this Court requiring the United States and defendants to pay to the State of California, from any funds of the United States available to this Court subject to its equitable jurisdiction, the full costs of implementing the provisions of federal immigration policy, as alleged above, for California Fiscal Year 1991-92 through 1994-95, and the costs of providing primary and secondary education to

undocumented aliens attending public schools for California Fiscal Years 1991-92 through 1994-95 and continuing for so long as the United States continues to violate the Tenth Amendment rights of the State of California and for so long as the immigration policies of the United States continue to violate the right of the State of California to a republican form of government, guaranteed by Article IV, section 4, of the United States Constitution.

197. Any law enacted by the Congress of the United States, or any regulation enforced by defendants, which impedes the State of California, and plaintiffs in this action, from determining the presence of illegal aliens within the State of California and from advising defendants of the presence of illegal immigrants within the State of California violates California's sovereign rights under the Tenth Amendment and the right to a republican form of government under article IV, section 4 of the Constitution.

198. The State of California, in furtherance of the equitable jurisdiction of this Court, to enforce its Tenth Amendment rights against the United States, and in furtherance of the equitable jurisdiction of this Court to encourage the apprehension and deportation of illegal aliens, also seeks equitable relief from this Court prohibiting the United States, and defendants in this action, from enforcing any law enacted by the Congress of the United States, or any law or regulation, including those enforced by the Education Secretary or other defendants, which prevents the State of California and plaintiffs in this action, from determining the presence of illegal aliens within the State of California, including within the elementary and secondary public school system of the

State of California and from advising defendants of the presence of illegal immigrants within the State of California, including in the elementary and secondary school system maintained by the State of California.

199. The State of California, in furtherance of the equitable jurisdiction of this Court, also seeks equitable relief from this Court prohibiting the United States, and defendants in this action, from enforcing any law enacted by the Congress of the United States, or law of regulation enforced by defendants or from applying such laws to the State of California, to prevent such reimbursement, and further seeks to mandate the Attorney General and Education Secretary and Director to take all necessary action to reimburse the State of California for such costs from any funds of the United States.

RELIEF REQUESTED

WHEREFORE, PLAINTIFFS REQUEST FROM THIS COURT:

1. Requiring defendants to reimburse plaintiffs for the costs of imprisoning alien felons; providing emergency health care for eligible undocumented immigrants; and providing educational services to undocumented alien children;

2. Declaring that defendants, through formal and de facto policies of nonenforcement or limited enforcement of the federal immigration laws, have failed to perform their duties under article IV, section 4 of the Constitution;

3. Declaring that defendants, through formal and de facto policies of nonenforcement or limited enforcement

of the federal immigration laws, have failed to perform their statutory duties under Title 8 of the United States Code;

4. Requiring defendants to fulfill their statutory duties under Title 8 of the United States Code, and requiring defendants within 30 days to prepare, adopt, publish and implement a plan to fulfill those duties consistent with Title 8 and article IV, section 4 of the Constitution;

5. Declaring any laws that interfere with defendants' performance of their duties under article IV, section 4 of the Constitution to be unconstitutional;

6. Enjoining the enforcement of any laws which prohibit plaintiffs from verifying the status of illegal immigrants residing in California or from advising defendants of the presence of illegal immigrants in California;

7. Declaring that, should the injunctive relief ordered in this judgment fail to redress the constitutional and statutory violations committed by defendants, plaintiffs may ask the Court to order reimbursement from defendants of costs incurred as a result of that failure, including but not limited to the cost of incarcerating illegal aliens convicted of a felony by the State of California;

8. Retaining continuing jurisdiction over this case to enforce or modify the relief requested;

9. Awarding plaintiffs their costs and such other and further relief as this Court may find just and proper.

DATED: September 21, 1994.

Respectfully submitted,

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Assistant Attorney General

Attorneys for Plaintiffs

DECLARATION OF SERVICE BY EXPRESS (OVERNIGHT) MAIL

Case Name: State of California et al. v. United States of America, et al.

Court No.: USDC, Southern Distr. No. 940674 K (CM)

I declare I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, P.O. Box 944255, Sacramento, California 94244-2550.

On September 21, 1994, I served the attached

AMENDED COMPLAINT FOR DECLARATORY AND MANDATE RELIEF AND INJUNCTION

In said cause, by placing a true copy thereof enclosed in a sealed envelope with postage fully guaranteed thereon for overnight express service, in the EXPRESS MAIL deposit box (at the above address) at Sacramento, California, addressed as follows:

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(Amicus Curiae)
County of San Diego
DIANE BARDSLEY, Chief Deputy
by IAN FAN, Deputy
1600 Pacific Highway, Rm. 355
San Diego, CA 92101-2469

I declare under penalty of perjury the foregoing is true and correct, and that this declaration was executed at Sacramento, California, on September 21, 1994.

/s/ B. A. Micheli
B. A. Micheli

(2)

Supreme Court, U.S.
FILED
MAY 8 1997
CLERK

No. 96-1596

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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AMICUS CURIAE BRIEF OF THE STATE OF FLORIDA IN SUPPORT OF PETITIONERS

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No. 96-1596

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE STATE OF FLORIDA IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Like California, Florida and a small number of other states are the collective hosts of millions of undocumented aliens. Although in theory only limited numbers of aliens may lawfully be admitted into the United States, because of the way in which the immigration laws are enforced—or not enforced—millions enter and remain here in violation of those laws. Most of these undocumented aliens have taken up residence in one of seven states.[1]

1 Those states, in addition to California, are Florida, Texas, Arizona, New York, New Jersey and Illinois.

As California has pointed out, all of these states except Illinois initiated legal actions in which they sought to compel the federal government to assume some responsibility for the severe economic burdens they were forced to bear as a result of federal immigration policy. None was successful.[2] California's petition for certiorari may present the last opportunity for this Court to consider and rule upon whether states have enforceable rights under the Invasion Clause and the Tenth Amendment.

What lends particular urgency to the need for review is that the federal government, having successfully—at least to now—obligated a small minority of states to absorb the costs of millions of *illegal* immigrants, has now enacted legislation and policies that will make the states—for the most part the same seven—financially responsible for the welfare costs of *legal* immigrants. Perhaps emboldened by the seeming defeat of the states in their federal court actions, Congress enacted the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996," P.L. 104–193, Title IV (110 Stat. 2105), legislation which it has trumpeted as calculated to make immigrants "self-sufficient." In fact, this legislation deprives many *legal* immigrants who have been residents of the United States for years of eligibility for food stamps and for supplemental security income ("SSI") under Title XVI of the Social Security Act.[3]

Thus, in addition to the burdens imposed by several hundred thousand illegal immigrants, Florida now estimates that over 38,000 legal immigrants resident in the state will

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2 *See Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995), *cert. denied*, 116 S.Ct. 1674 (1996); *State of Arizona v. United States*, 104 F.3d 1095 (9th Cir. 1997); *Padavan v. United States*, 82 F.3d 23 (2nd Cir. 1996); *State of New Jersey v. United States*, 91 F.3d 463 (3rd Cir. 1996); *State of Texas v. United States*, 106 F.3d 661 (5th Cir. 1997).

3 Supplemental security income is a program authorized by Title XVI of the Social Security Act, 42 U.S.C. §1381(a)–1383(d), that provides subsistence benefits to the blind, the elderly and the disabled.

be ineligible for food stamps and that approximately 54,000 blind, elderly or disabled legal immigrants will be ineligible for SSI as a result of the 1996 legislation. Florida will have no choice but to assist the destitute and disabled with state funds. Other states similarly situated will undoubtedly confront comparable burdens.

Although the 1996 legislation presents somewhat different legal and constitutional considerations, it is apparent that the federal government's operative immigration policies now seriously threaten the federal-state balance and the financial integrity of many states. Contrary to many of this Court's recent pronouncements, the states—or at least a few disfavored ones—have been made the financial agents of the federal government and they have no choice but to bear the costly burdens of both legal and illegal immigration. Were more than a handful so threatened, a national crisis would clearly be at hand. But a crisis is at hand, nevertheless, for the small minority of states that have become the federal government's fiscal agents.

This Court should begin to set the balance right by addressing California's claims based on the Invasion Clause and the Tenth Amendment.

STATEMENT OF THE CASE

California's amended complaint seeks relief against the federal government from the enormous costs the state has been forced to absorb as a result of the continuing presence of massive numbers of undocumented aliens. California alleges that there are some 1.7 million illegal immigrants in the state and that an estimated 125,000 additional illegal immigrants enter the state every year. Expenditures for emergency medical services, incarceration and parole services for this segment of the population have run into the billions of dollars.

California's constitutional claims are based on the Invasion Clause of Article IV, §4, United States Constitution, and on the Tenth Amendment. It asserts that the United States has failed under the Invasion Clause to protect it from an overwhelming deluge of illegal immigrants and that the United States has also failed utterly in its statutory responsibilities to deport those illegal immigrants it might readily deport (*e.g.*, those convicted of certain felonies), and prosecute those who unlawfully reenter after deportation. California further contends that compelling it to provide emergency medical services to illegal immigrants as part of the state's Medicaid responsibilities violates the Tenth Amendment.

The amended complaint sought a declaration that the respondents are not performing their constitutional and statutory duties; an order requiring respondents to prepare and implement a plan for fulfilling their duties; and reimbursement of the state's costs for providing emergency health care to illegal immigrants.

The Court of Appeals, affirming the dismissal of the amended complaint, tersely ruled that the Invasion Clause claim presented a nonjusticiable political question, relying on *Baker v. Carr*, 369 U.S. 186, 217 (1962). And, analogizing to an earlier decision involving federal *highway* funds, *Nevada v. Skinner*, 884 F.2d 445 (9th Cir. 1989), it refused to consider that California was subject to any unconstitutionally coercive pressures respecting Medicaid as long as the state was free to increase state tax revenues to make up for any lost federal funds. Accordingly, the Court of Appeals ruled that California failed to state a claim for relief under the Tenth Amendment.

SUMMARY OF ARGUMENT

I.

It is clear that neither Congress nor the Executive Branch intends to vigorously deter illegal immigration or to alleviate the financial burdens that the seven most affected states have borne—and will continue to bear—as a direct conse-

quence of their immigration policies. Thus, while the narrower issue posed by this case is whether the Invasion Clause is a source of enforceable rights for the states, this case also presents a larger issue of constitutional federalism the significance of which can scarcely be overstated.

When for obvious structural reasons neither of the political branches has any incentive to protect and assist a small minority of states, those states may not be denied the clear promise of protection embodied in the Invasion Clause because of a misplaced, if not contrived, concern for "foreign policy." The question presented by California's Invasion Clause claim is whether the states have a right to protection from invasion or to financial restitution when that protection is not forthcoming. That is an issue of domestic significance only, not of foreign policy. Hence, it is not a nonjusticiable political question.

II.

California plainly has no alternative to spending hundreds of millions of state tax dollars to provide emergency medical care for illegal immigrants in order to remain eligible for federal Medicaid assistance. California's choice to remain in the Medicaid program is not the result of pressure, but rather of the most patent coercion. Moreover, California has far more illegal immigrants than any other state, the vast majority of which have few or none. If illegal immigrants are entitled to emergency medical care, that care should be paid for entirely with federal tax dollars. For the national government to compel only a few states to bear this cost violates the Tenth Amendment by conscripting the resources of those few states to pay for a national problem and by making it appear that those states are willingly pursuing their own legislative agendas rather than the agenda of the national government.

ARGUMENT

I. CLAIMS BASED ON THE INVASION CLAUSE MUST BE CONSIDERED JUSTICIABLE WHEN ONLY JUDICIAL ACTION CAN PRESERVE THE ESSENTIAL BALANCE OF OUR CONSTITUTIONAL STRUCTURE.

The importance of the issues presented in this case is self-evident. By its own admission, the national government has lost control of the nation's borders. The resultant tide of illegal immigration has imposed enormous costs on only a handful of states—seven to be exact—and the remaining 43 are virtually unaffected by it. In the starkest practical terms, this case presents the question whether officials of the national government can, essentially by defaulting on their constitutional and statutory duties, impress a few states to bear huge, disproportionate and wholly inequitable financial costs. The legal question presented by this case is of the utmost importance for constitutional federalism: whether a constitutional provision securing the states against "invasion" means what it says, and, if so, whether it is judicially enforceable.[4]

The predicament in which the seven states now find themselves did not just happen. These states are caught between the federal executive branch, which at best is indifferent to their plight and at worst profits from it,[5] and the Congres-

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4 Article IV,§4, United States Constitution, provides in pertinent part that: "The United States shall guarantee to every State in this Union a Republican Form of Government, *and shall protect each of them against invasion;....*"

5 That illegal immigrants produce a net financial gain for the national government and that the costs attributable to them for education, medical services, and incarceration far exceed state and local revenues generated from them in the seven most affected states does not seem open to serious question. *See, e.g.*, Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class,* 42 UCLA L. Rev. 1509, 1539 & n. 126 (1995) (citing Fix & Passel, *Immigration and Immigrants: Setting the Record Straight 6* (1994)); Legomsky, *Immigration, Federalism and the Welfare State,* 42 UCLA L. Rev. 1453, 1470 (1995) (citing *Urban Institute Report I,* chs. 3–5).

sional representatives of the other forty-three states who have every incentive to let the minority of states absorb the costs of a national policy of accommodating illegal immigration. The practical and constitutional importance of the justiciability of the Invasion Clause is therefore underscored and heightened by the absence of any political mechanisms or incentives by which the underlying constitutional strains might be eased.

The situation thus speaks for itself: this Court is the only remaining forum in which the vital questions of constitutional structure presented by this case can be addressed. "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [this Court] to admit inability to intervene when one or the other level of Government has tipped the scales too far." *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 1639 (1995) (Kennedy, J., joined by O'Connor, J., concurring).

A. California's Claim Does Not Present A Nonjusticiable Political Question.

The Court of Appeals brushed off the Invasion Clause claim with the facile assertion that "the issue of protection of the states from invasions implicates foreign policy concerns which have been constitutionally committed to the political branches," and also cited *Fiallo v. Bell*, 430 U.S. 787, 792 (1977), for the proposition that "the political branches have plenary powers over immigration." (Pet. App. 12)

The issue here has little if anything to do with either foreign policy or the federal government's plenary authority over immigration. A federal policy to essentially ignore the influx of massive numbers of illegal immigrants cannot, absent an Orwellian twist of words' common meanings, be considered "foreign policy." Indeed, respondents cannot point to the statement of even one federal executive official who has ever said that the United States is compelled to accommodate illegal immigration because of overriding foreign policy concerns. Even less has Congress come to that conclu-

sion as a result of considered debate. Hence, the federal government's effective seizure of state resources—even if only through its silence and inaction—to provide for the needs of illegal immigrants no more presents a problem of foreign relations than did the attempt of President Truman to seize the steel mills at the height of the Korean War. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). This Court did not shrink from addressing the legality of that seizure on the grounds that the case presented a nonjusticiable political question involving the separation of executive and legislative powers or inconvenient political questions. *See, e.g., Baker v. Carr*, 369 U.S. 186, 211 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers"). Nor should it do so now. Here, as in *Youngstown,* the impact of federal action is suffered by discrete, identifiable entities—in this case a few disfavored states. No foreign power can have or should have a stake in this issue.[6]

Even if it could be said that enforcing the Invasion Clause and the immigration laws might cause some concern to some unidentified foreign nations, the courts, for that reason alone, are hardly justified in invoking the political question doctrine. This Court rejected precisely such an argument in *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986). That decision construed a statute to determine whether it imposed a mandatory duty on the Secretary of Commerce to certify Japan's refusal to abide by international whaling quotes. If this Court had decided that a certification should have been issued, then the Secretary of Commerce would have been required to impose economic sanctions against a foreign country—Japan. Nonetheless, this Court peremptorily dismissed the suggestion that a political ques-

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6 *See also Goldwater v. Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, C. J. concurring in the judgment). Justice Rehnquist recognized that President Truman's action was one "of profound and demonstrable domestic impact."

tion was involved, saying "not every matter touching on politics is a political question,...and...it is 'error to suppose that every case or controversy which touches on foreign relations lies beyond judicial cognizance.'" Id. at 229–230 (quoting *Baker v. Carr*, 369 U.S. 186, 209 (1962)) "[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." 478 U.S. 230.

This being so, this Court is not precluded from construing the Invasion Clause for the reason that the issue presented may have political overtones or touch on foreign relations. Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), this Court has recognized that the constitutional ideal of the rule of law requires legal remedies adequate to keep the government within the bounds of law. And "whether the action of [either the Legislative or Executive Branch] exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Nixon v. United States*, 506 U.S. 224, 113 S.Ct. 732, 740 (1993) (quoting *Baker v. Carr, supra*, 369 U.S., at 211).

Moreover, as in *Baker v. Carr*, this case involves the clear failure of the political process, in this case a failure to seriously address the needs of seven states who bear the burdens of illegal immigration and who are unable to protect themselves in the national political process. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court expressly anticipated that judicial enforcement of the values of federalism might sometimes be necessary under principles "tailored to compensate for possible failings in the national political process rather than to dictate 'a sacred province of state autonomy.'" *Id.* at 554.

If *Baker v. Carr, Marbury v. Madison,* and *Japan Whaling Ass'n*, mean anything, it simply will not do to cavalierly dismiss California's Invasion Clause claim on the ground

that it presents a question textually committed to the political branches. The political process has plainly failed the seven states. No amount of political bargaining is going to alleviate the plight of the seven states when the benefited majority have no incentive to share their burdens. This Court should therefore grant the writ of certiorari in this case to vindicate and clarify the principles reflected in *Garcia:* basic principles of constitutional federalism require judicial protection of the integrity of the states and their political processes in cases involving plain and predictable "failings in the national political process" that, for structural reasons, are unlikely to be self-correcting over time.

B. The Duty Imposed By The Invasion Clause Is Not Limited To Instances Of "Foreign Hostility" Or "Ambitious Or Vindictive Enterprises" Of Other States.

The Court of Appeals improperly sought to limit the reach of the protection afforded the states by the Invasion Clause by saying that it applied only to hostile invasions or "ambitious or vindictive enterprises" on the part of other states or foreign nations, relying on *The Federalist* No. 43 (Cooke ed. 1961). (Pet. App. 13)

That the states, in joining the Union, would surrender their right and power as sovereigns to protect themselves from *any form* of invasion in exchange for an unenforceable promise of protection only from essentially hostile invasions or enterprises is almost unthinkable, and certainly the notion demands more support than the statement of a single Founding Father. Does the Court of Appeals actually mean that the United States as a nation can act only to repel armed, or at least organized, invasions but not those resulting from the decisions of literally millions to ignore the immigration laws? Such an interpretation cannot be squared with even the case law the Court of Appeals cited. *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (noting that the power to expel or exclude aliens is a "fundamental sovereign attribute").

The Invasion Clause has not in the past proved so troublesome or devoid of pith, nor have the courts, at least until these cases came along (see cases cited in note 2, supra), seemed so ready to constrain, if not abandon, a core power of a sovereign nation. Their interpretations of the Invasion Clause constitute an astounding narrowing of sovereign power. Moreover, the idea that the Invasion Clause applies *only* to armed or otherwise hostile foreign invasions is directly contrary to this Court's pronouncement in *The Chinese Exclusion Case*, 130 U.S. 581 (1889). In that decision, immediately after referring to the Invasion Clause, this Court plainly stated that the clause was not limited to hostile, military invasions:

> The United States is not only a Government, but it is a national government....*[T]he Government is clothed with power to guarantee to every State a republican form of government, and to protect each of them against invasion* and domestic violence....To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. *It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us.*

Id. at 605–606 (emphasis added).

The states cannot control the nation's borders. They have no power to protect themselves against invasions of undocumented aliens or to deport them. Having foreclosed the states' ability to protect themselves from intruding hordes, the national government assumes an obligation—made explicit in Article IV, section 4—to provide minimally adequate protection to the states.

It is not beyond the capacity of a federal court to determine, based on the overwhelming facts that California has adduced, that the United States has simply failed in its constitutional duty to protect that state from invasion by vast numbers of illegal immigrants. As this Court pointedly stated in *The Chinese Exclusion Case*, it matters not in what "form" that encroachment may come. The Court of Appeal's strained and dubious reading of the Invasion Clause plainly warrants further review.

II. REQUIRING CALIFORNIA TO SPEND STATE TAX DOLLARS TO PROVIDE EMERGENCY HEALTH CARE TO ILLEGAL IMMIGRANTS VIOLATES THE SPENDING CLAUSE AND THE TENTH AMENDMENT.

It is one thing for a state to make a considered decision on behalf of its citizens to join a cooperative federal-state program like Medicaid when it has had the opportunity to thoroughly analyze and debate the pros and cons of that decision. It is quite another for a state to be told two decades later, after structuring a substantial part of its state health care system around this program, that, as a condition of remaining eligible for Medicaid money, the state must expend hundreds of millions of its own tax dollars to provide emergency medical care to persons who had no legal right to enter the United States and who remain only because of the inaction of the national government. This is a classic Hobson's Choice—that is, no choice. It is also coercive and in violation of the Tenth Amendment.

In this instance California is not only pressured, it is compelled to accept the good with the bad. Although a few other states that have substantial illegal immigrant populations face the same dilemma, not one of them even comes close to California's population of 1.7 million illegal immigrants. To a far greater extent than any other state, California must subsidize a class of persons who should be entirely

the responsibility of the federal government and whose medical care should be paid for entirely with federal tax dollars. *See Plyler v. Doe*, 457 U.S. 202, 241 n.1 (1982) (Burger, C. J., dissenting). For Congress to decree that California has the option of foregoing all Medicaid money is the rankest form of compulsion imaginable and it clearly falls within the scope of this Court's words of warning in *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)—that a financial inducement cannot be so coercive "as to pass the point at which pressure turns into compulsion."[7]

Contrary to this Court's repeated pronouncements in *New York v. United States*, 505 U.S. 144 (1992), Congress has thus devised a scheme whereby California is compelled to use California tax dollars to support a federal policy of accommodating—and in certain critical ways encouraging—illegal immigration. In *New York v. United States*, this Court held that a federal statute requiring states either to provide for disposal of nuclear waste or to take title to it offended the Tenth Amendment for a very similar reason. The challenged statute "'commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce'" a national program. 112 S.Ct. at 2420. Such commandeering, this Court reasoned, deprived the states of their constitutional role as distinct and independent sovereigns. The national government, the Court held, "may not conscript state governments as its agents." *Id.* at 2429.

Here it is obvious that California has been conscripted as the federal government's agent to pay half the costs of providing emergency medical care for a class whose very presence is unlawful, but which, for all practical purposes,

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7 It is worthy of note that this Court pointed out in *South Dakota v. Dole* that were South Dakota to reject the higher legal drinking age Congress was encouraging states to adopt, it stood to lose only 5% of the funds otherwise obtainable by the state under federal highway programs. 483 U.S. at 211. The consequences for California should it not submit to Congress's coercion are far more dire.

the government has decided to ignore. Illegal immigration is a national problem whose costs should be absorbed by a national program. The national government should not be permitted under the guise of revenue sharing to foist half the total costs of emergency medical care on a few disfavored states.

A second basis for the decision in *New York* also applies to this case. *New York* reasoned that to allow the national government to impose *de facto* obligations to legislate regarding nuclear waste disposal would leave citizens uncertain where responsibility for the location of waste disposal sites lay—with Congress, which effectively coerced the states into legislating, or with state officials, who would have made the ultimate legislative decision, but would have done so only in response to congressional coercion. "Accountability is...diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation." 112 S.Ct. at 2424.

The national government's failure to stem the flood of illegal immigration in this case, coupled with its failure to fund state expenditures necessitated by that flood, has an accountability-diminishing effect that is even more acute than that at issue in *New York*. Compelled state expenditures for the benefit of non-citizens, amounting to hundreds of millions of dollars annually, predictably tend to create a backlash of resentment directed at the *state*. It is no wonder that citizens' ballot initiatives in turn seek to assume the state's decision-making prerogatives and deny public services and benefits, including education, to illegal immigrants.

What is constitutionally significant is that all political determinations made under such circumstances involve blurred lines of political accountability. As in *New York*, "federalism is hardly being advanced." 112 S.Ct. at 2432. This Court should grant the writ in this case to clarify the principles of federalism reflected in the Constitution and in *New York* and

to apply those principles in a case of great practical importance.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, this Court should grant a writ of certiorari and review the decision of the Court of Appeals.

Respectfully submitted,

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In The

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STATE OF CALIFORNIA, et al.,

Petitioners,

v.

UNITED STATES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* COUNTY OF SAN DIEGO IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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INTEREST OF *AMICUS CURIAE* COUNTY OF SAN DIEGO

The underlying action brought by the State of California ("State") concerns the State's right to sue the United States over its failure to adequately protect the United States-Mexico border from illegal immigration. *Amicus curiae* County of San Diego ("County")[1] is situated on that border, and thus is the first point of entry for persons entering the United States illegally. This illegal immigration impacts the County financially. The County bears substantial direct costs resulting from arrest and incarceration of illegal aliens who commit crimes. The County also spends considerable amounts of its limited resources on providing emergency medical services for illegal aliens. The County therefore has a substantial interest in the State's argument relating to the Invasion Clause of the United States Constitution, art. IV, § 4. This brief will be limited to that issue only.

ARGUMENT

The Ninth Circuit Court of Appeals found that the State's Invasion Clause argument was deficient for two reasons. The court first found that the argument presented a nonjusticiable political question. App. A-11. In addition, the court rejected the State's argument that the Invasion Clause applied to illegal immigration, and instead held that the Clause was intended to apply only

[1] Pursuant to Sup.Ct.R. 37.4, the County is filing this brief without first filing a motion for leave to file an *amicus curiae* brief.

to situations involving foreign hostility or armed hostility from another political entity. App. A-13. As discussed below, the term "invasion" applies to mass illegal immigration across the United States-Mexico border. In addition, the Invasion Clause claim is justiciable.

1. The Invasion Clause applies to illegal immigration

The Ninth Circuit relied upon *The Federalist No. 43* (James Madison) in rejecting the State's argument that the Invasion Clause applied to illegal immigration. However, in interpreting the language of the Invasion Clause, the court should have first construed the term "invasion" in accordance with its ordinary or natural meaning. *F.D.I.C. v. Meyer*, 510 U.S. 471, ___, 127 L.Ed.2d 308, 317 (1994). After all, "[l]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." *Addison v. Holly Hill Fruit Prod., Inc.*, 322 U.S. 607, 618 (1944). The term "invasion" is not a technical term, and thus the court below should have determined the ordinary or natural meaning of "invasion" without resort to *The Federalist No. 43*.

Had the court below determined the ordinary or natural meaning of "invasion," it would have found that the definition has not changed since the passage of the Constitution. As the State notes in its Petition for Writ of *Certiorari*, the definition from Samuel Johnson's *Dictionary of the English Language* (1755) for "invasion" is "hostile

entrance upon the rights or possessions of another; hostile encroachment." State Petition at 17. The current definition of "invasion" in *Webster's Third New Int'l Dictionary* 1188 (1971) is "a hostile entrance or armed attack on the property or territory of another for conquest or plunder . . . an encroachment upon a right protected by law affording grounds for an action for damages or some other remedy."

In addition, it is appropriate for courts to compare definitions of ordinary words at the time of the passage of the Constitution with the current definitions of such words. *See Duckworth v. Franzen*, 780 F.2d 645, 651-52 (7th Cir. 1985), *cert. denied*, 470 U.S. 816 (1986).

Thus, the definition of "invasion" then and now is not limited to armed hostilities from other political entities. It is true that this is the gloss put on the term "invasion" by James Madison in *The Federalist No. 43*. However, as explained above, there is no need to resort to legislative history if the language of the provision in question is clear, and it is clear in this case. Moreover, James Madison's comments in *The Federalist No. 43* are entitled to little weight. *See Bath Iron Works Corp. v. Director, Office of Worker's Compensation*, 506 U.S. 153, 166 (1993) (no weight given to single reference by single Senator during Senate floor debate).

Finally, as the State notes in its Petition, the language of *The Federalist No. 43* relating to "invasion" is based upon a "latitude of expression" of the term. James Madison's discussion, while discussing "foreign hostility" and "ambitious or vindictive enterprises of more powerful

neighbors," does not preclude defining "invasion" to include other forms of hostile entrance or encroachment.

That an invasion has occurred cannot be questioned. *See* discussion below. As one commentator has observed:

> The federal government has exclusive control over immigration policy. Lax enforcement of federal laws that prohibit employment of illegal immigrants, coupled with an inability or unwillingness to police the borders effectively, has resulted in a massive influx of undocumented immigrants into the United States. An overwhelming percentage of these immigrants settle in just seven states. California alone accommodates a staggering forty percent of all illegal immigrants.
>
> This added population places heavy burdens on these states' resources. . . . [A]ccording to the GAO report, the net annual cost of illegal immigration to California is $1.25 billion.

Note, *Unenforced Boundaries: Illegal Immigration and the Limits of Judicial Federalism*, 108 Harv. L. Rev. 1643, 1644-46 (1995) (footnotes omitted).

Accordingly, the court below construed the term "invasion" too narrowly, and not consistent with the ordinary and natural meaning of that term.

2. The Invasion Clause claim is justiciable

The court below, relying upon *Baker v. Carr*, 369 U.S. 186 (1962), found the State's Invasion Clause claim to be a non-justiciable political question. App. A-11 to A-12. Specifically, the court below found that the Invasion

Clause implicated foreign policy concerns which had been constitutionally committed to the political branches. The court below also found that there were no manageable standards to ascertain whether or when an influx of illegal aliens would constitute an "invasion."

The court's reasoning involved the first two *Baker* "formulations" for determining whether a case was nonjusticiable because of a political question. *Baker* stated that "[p]rominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . " *Baker*, 369 U.S. at 216.

The court below first found that the Invasion Clause implicates foreign policy concerns which have been constitutionally committed to political branches. It then stated that "[t]he Supreme Court has held that the political branches have plenary powers over immigration," citing *Fiallo v. Bell*, 430 U.S. 787 (1977). App. A-12. This, however, does not meet *Baker*'s formulation of a "*textually* demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 430 U.S. at 416 (emphasis added). As *Baker* stated, the issue is "whether a matter has in any measure been committed *by the Constitution* to another branch of government. . . . " *Id.* at 211 (emphasis added). In this circumstance, the Constitution itself does not give plenary powers over immigration to the political branches. *Fiallo* simply noted that Supreme Court case law had found that Congress had plenary power over admission of aliens. *Fiallo*, 430 U.S. at 792.

The Constitution was nowhere mentioned in this discussion of plenary power, and the cases cited by *Fiallo* do not hold otherwise. *See Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (Supreme Court has sustained Congress's plenary power over aliens); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) (Congress has plenary power over admission of aliens). *See also Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) (ability to exclude aliens is an incident to every independent nation). There being no textual and direct commitment by the Constitution of immigration to the political branches, it follows that the first *Baker* formulation does not apply.

Nor does the second *Baker* formulation apply. That formulation requires the "lack of judicially discoverable and manageable standards for revolving [the issue]." *Baker*, 369 F.2d at 217. The court below defined the issue as "ascertain[ing] whether or when an influx of illegal immigrants should be said to constitute an invasion." App. A-12.

It is submitted that an invasion is like pornography: you know it when you see it. *See Jacobellis v. Ohio*, 376 U.S. 184, 197 (1964) (Stewart, J., concurring). In this case, the number of illegal immigrants in California increased from 1.441 million in October 1992 to 2 million in October 1996. 1995 Statistical Yearbook of the Immigration & Naturalization Serv., p. 183 (issued March 1997); 1994 Statistical Yearbook of the Immigration & Naturalization Serv., p. 179 (issued Feb. 1996). According to the Federation for American Immigration Reform, the United States Border Patrol reported that during fiscal year 1993, over 1 million illegal aliens were apprehended along the California-Mexico border, but that 2 million illegal aliens crossed the

border without being apprehended. Immigration and California, http://www.fairus.org/042ca702.htm.

In other words, the illegal alien population in California increased by 39 percent from 1992-96. And in fiscal year 1993, approximately 3 million illegal aliens attempted to enter California. This is clearly an "invasion" as that term is commonly understood to include a hostile encroachment.

CONCLUSION

For all of these reasons, this Court should grant the State's Petition for Writ of *Certiorari*.

Respectfully submitted,

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Supreme Court, U.S.
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No. 96-1596

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION; U.S. SENATOR DIANNE FEINSTEIN; U.S. REPRESENTATIVES ELTON GALLEGLY, DAVID DREIER, CHRISTOPHER COX, JAY KIM, GARY CONDIT, KEN CALVERT, STEPHEN HORN, RICHARD POMBO, JOHN DOOLITTLE, EDWARD ROYCE, JERRY LEWIS, WALLY HERGER, RANDY CUNNINGHAM, HOWARD MCKEON, FRANK RIGGS, GEORGE RADANOVICH, BRIAN BILBRAY, SONNY BONO, JANE HARMAN, JAMES E. ROGAN, PHILIP M. CRANE, TILLIE FOWLER, KAREN THURMAN, GERALD SOLOMON, SUSAN MOLINARI, AND BOB FRANKS; CALIFORNIA SENATORS K. MAURICE JOHANNESSEN, JAMES L. BRULTE, RICHARD L. MOUNTJOY, RICHARD RAINEY, AND BRUCE MCPHERSON; AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*

The *amici curiae* filing this brief are a bipartisan group of Members of the United States Congress and the California Senate, the Washington Legal Foundation, and the Allied Educational Foundation.[1] The *amici,* who support the complaint filed in this litigation by the State of California, believe that inadequate enforcement of the federal immigration laws -- which only the federal government has the power to enforce -- has created an untenable situation for lawful residents in California and other affected states. The *amici* further believe, for the reasons set forth in this brief, that the federal government's failure to compensate states for certain burdens from illegal immigration is unlawful.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. WLF participates in litigation and administrative proceedings affecting the broad public interest, and has a particular interest in ensuring that the rights of states are fully protected by the federal government. In that regard, WLF has participated as a party or *amicus curiae* in numerous cases before this Court and other federal and state courts. In particular, WLF filed *amicus* briefs in this case in both the district court and the court of appeals. It filed *amicus* briefs at various levels of the federal courts, on behalf of itself and a bipartisan group of 42 Members of Congress, in support of a similar lawsuit brought by the State of Florida, *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995), *cert. denied,* 116 S. Ct. 1674 (1996). WLF also represented a group of federal legislators in

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[1] Pursuant to Supreme Court Rule 37.6, *amici* hereby state that no counsel for a party in this case authored this brief in whole or in part.

support of the State of Texas in its similar lawsuit, *Texas v. United States*, 106 F.3d 661 (5th Cir. 1997).

The legislators joining the brief are U.S. Senator Dianne Feinstein; U.S. Representatives Elton Gallegly, David Dreier, Christopher Cox, Jay Kim, Gary Condit, Ken Calvert, Stephen Horn, Richard Pombo, John Doolittle, Edward Royce, Jerry Lewis, Wally Herger, Randy Cunningham, Howard McKeon, Frank Riggs, George Radanovich, Brian Bilbray, Sonny Bono, Jane Harman, James E. Rogan, Philip M. Crane, Tillie Fowler, Karen Thurman, Gerald Solomon, Susan Molinari, and Bob Franks; and California Senators K. Maurice Johannessen, James L. Brulte, Richard L. Mountjoy, Richard Rainey, and Bruce McPherson.

The Allied Educational Foundation is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, the Allied Educational Foundation is dedicated to promoting education in diverse areas of study, and is concerned with the financial impact of illegal immigration upon public educational systems.

Amici submit this brief in support of Petitioners with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby incorporate by reference the Statement of the Case in Petitioners' brief.

In brief, the State of California filed suit seeking relief from the consequences of what it argues is a failure by the

federal government to enforce the immigration laws. California seeks declaratory and injunctive relief as well as money damages to compensate it for expenses it incurred as a result of that failure.

Evidence submitted by California indicated that there are now 1.7 million undocumented aliens living illegally in the State (5% of California's population) and that the number increases by about 125,000 per year. Petition Appendix ("Pet. App.") 9. In the fiscal year in which suit was filed, California spent nearly $2.4 billion in providing federally mandated education and health care benefits to illegal aliens and in incarcerating illegal aliens who commit crimes within the State. *Id.* The annual cost of providing education to illegal alien children alone is $1.5 billion. *Id.* at 10 n.3. California seeks reimbursement for these costs from the federal government.

Among the statutory and constitutional provisions cited by California in support of its claim were the Tenth Amendment to the Constitution and the Invasion Clause of Article IV, § 4 of the Constitution (which requires the United States to "protect each of [the States] against Invasion"). California asserts that since the federal government concedes that the 1.7 million undocumented aliens are in the State illegally yet makes little effort to deport them, prohibits California from attempting to deport them, and requires California to provide services to them, the Constitution requires the federal government to reimburse California the cost of providing those services.

The U.S. District Court for the Southern District of California dismissed the complaint in March 1995 pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted. The court held that Cali-

fornia's Invasion Clause claim presented a nonjusticiable political question (Pet. App. 34), and also held that no such claim could be made out in the absence of evidence that the undocumented aliens had come to California with a "hostile" intent. *Id.* at 31-32. The district court dismissed California's Tenth Amendment claim on the ground that the federal government had not commandeered the apparatus of state government -- because California could avoid any obligation to provide health care benefits to illegal aliens by declining to accept federal funds and because the obligation to provide education to illegal alien children was imposed by the U.S. Constitution, not by federal government policy. *Id.* at 37-38, 46. The court also held that all claims for reimbursement were barred by sovereign immunity. *Id.* at 47-48.

On January 7, 1997, the U.S. Court of Appeals for the Ninth Circuit affirmed. The court agreed with the district court that California's Invasion Clause claim presented a nonjusticiable political question. *Id.* at 11-13. The court also agreed that California had failed to state a claim under the Tenth Amendment. *Id.* at 14-18. The court held that California voluntarily assumed the obligation to provide medical services to illegal aliens when it accepted federal Medicaid funds (Pet. App. 15) and that California was not required to pursue the penal policy that resulted in the incarceration of illegal aliens at State expense. *Id.* at 17. The court held that the Tenth Amendment was not implicated by the obligation imposed on California to provide education to illegal aliens, because "the obligation to provide this education derives from an independent constitutional obligation and not federal immigration policy, *see Plyler v. Doe,* 457 U.S. 202, 230 (1982)." *Id.* at 18. The court added that the Tenth Amendment claims were "unquestionably beyond the authority of the judicial

branch" because they presented nonjusticiable political questions. *Id.*

REASONS FOR GRANTING THE PETITION

The virtual abdication of federal responsibility over immigration enforcement, combined with the educational, medical, and law enforcement obligations that California and similarly-situated States must assume, has created an unfunded federal mandate of monumental proportions. The constitutionality of this mandate has been or is being tested by numerous States seeking judicial relief that would compel the federal government to fulfill its duty either to enforce the immigration laws adequately or to compensate for the costs incurred as a result of federal nonfeasance. The magnitude of this litigation -- in terms of the amount of taxpayer funds at issue, the number of States involved, and its implications for federal-state relations -- justifies this Court's review. That review should encompass both the Ninth Circuit's application of the political question doctrine and its rejection of California's Tenth Amendment claims on their merits.

I. The Issues Presented Are of Nationwide Significance and Are the Subject of Nationwide Litigation

Throughout the history of the United States, immigrants have made invaluable contributions to our society. But illegal immigration has created significant demands on public resources in recent years. These demands are not spread evenly throughout the nation, but rather are concentrated upon a small number of states, particularly California.

During the first century of the Nation's history, immigrants were numerous, but the legal relationship between the States and the federal government during that period was such that the immigrants created fewer demands on State resources. Most importantly, the states themselves were thought to have an independent authority to regulate immigration -- and they did so to protect themselves against the costs of immigrants who might become public charges. *See Henderson v. Mayor of the City of New York*, 92 U.S. 259 (1876).

Not until 1876, in *Henderson*, did this Court hold such state regulations unconstitutional. There, the Court struck down an 1824 New York State statute that required masters of passenger ships to provide either: (1) a $300 bond for any foreign passenger "to indemnify the commissioners of emigration, and every county, city, and town in the State, against any expense for the relief of the person named in the bond for four years thereafter," or (2) a fee of $1.50. *Henderson*, 92 U.S. at 267. The Court held that the statutes impermissibly interfered with the authority of Congress "to regulate commerce with foreign nations." *Id.* at 270-71. The Court in *Henderson* also struck down similar statutes of California and Louisiana. *Id.* at 273-75.

Today, therefore, the States themselves have no power to enforce federal immigration laws. As a consequence, the fiscal burden upon the States from immigration is greatly magnified by the federal government's failure to enforce its own immigration laws adequately. The district court in this case acknowledged as much, even as it rejected California's claims: "[T]he State of California does have valid concerns about the financial drain caused by an issue over which it has no jurisdiction; that is, the control of the border." Pet. App. 27.

As the result of federally imposed requirements, and the need to protect California residents who are lawfully present, the State of California must provide costly medical and educational services to illegal aliens without federal reimbursement, and must also expend considerable resources on the apprehension of illegal aliens who commit crimes in the State. Pet. App. 9-10 & n.3.

In response to these federal mandates, the constitutionality of the federal government's failure to provide reimbursement is not just the subject of this action, but of litigation brought by States across the country: Arizona,[2] Florida,[3] New York[4], New Jersey,[5] and Texas.[6] These states brought suit in recognition of the impossibility of obtaining relief in the national political arena, given that the fiscal burdens from illegal immigration are now borne disproportionately by only a handful of states. While none of the six suits (which all raised Tenth Amendment claims and five of which raised Invasion Clause claims) has been successful to date, three of them are still pending -- this suit plus the ones brought by Arizona and Texas. Moreover, the five appeals courts hearing these cases diverged significantly in their approaches to the Tenth Amendment

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[2] *Arizona v. United States*, 104 F.3d 1095 (9th Cir. 1997), *cert. pending* (No. 96-1595, filed Apr. 7, 1997).

[3] *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1674 (1996).

[4] *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996)(lawsuit brought by state legislators).

[5] *New Jersey v. United States*, 91 F.3d 463 (3d Cir. 1996).

[6] *Texas v. United States*, 106 F.3d 661 (5th Cir. 1997).

claims: the court below as well as the Third Circuit (*New Jersey*, 91 F.3d at 470) held that the States' Tenth Amendment claims raised nonjusticiable political questions, while the Second, Fifth, and Eleventh Circuit reached the merits of the States' Tenth Amendment claims. *Padavan*, 82 F.3d at 28-29; *Texas*, 106 F.3d at 666; *Chiles*, 69 F.3d at 1097. The decision of virtually all of the affected States to file federal court challenges to the federal government's nonreimbursement policy attests to the importance of the issues raised. Given the importance of the issue, the Court should grant the petition in order to provide guidance to the lower courts regarding the justiciability of the claims raised, and regarding the merits of those claims.

II. The Court Should Decide Whether Claims Challenging the Federal Government's Policy of Nonreimbursement Are Justiciable Under Either the Tenth Amendment or the Invasion Clause

As noted above, virtually all of the States disproportionately affected by the federal government's nonreimbursement policy regarding the cost of services provided to illegal aliens have filed suit challenging that policy. The Ninth Circuit held in this case that the claims raised by California with respect to that policy are simply not justiciable in the federal courts. Given the important position occupied by States in our federal system of government, *amici* submit that it is incumbent upon the Court to decide whether the courthouse door is to be barred to the six States who believe that the federal government's nonreimbursement policy is an affront to their sovereignty.

Judicial review over cases raising questions of federal law has been one of the fundamental principles of this nation's constitutional democracy ever since this Court's

decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). By refusing to exercise judicial review over the constitutional claims raised below, the Ninth Circuit has abdicated its duty and obligation under the Constitution. *Amici* submit that the Ninth Circuit's decision finding a "political question" to exist in an area of such legal and practical importance constitutes an important federal question sufficient to justify a grant of certiorari.

The Ninth Circuit's decision is in conflict with several decisions of this Court and with the general principles of judicial review. If allowed to stand, the Ninth Circuit's decision will remove judicial review from an entire class of cases of great importance to the millions of American citizens that live in the nation's largest judicial circuit. In recent years, this Court has reaffirmed that judicial review ought to apply with equal force to questions involving the relationship between the federal and state governments. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Court imposed a clear statement rule upon the Age Discrimination in Employment Act so as to protect state sovereignty over the employment of its own officials. In *New York v. United States*, 505 U.S. 144 (1992), the Court invalidated an attempt by Congress to commandeer state legislatures via the Commerce Clause. In *United States v. Lopez*, 115 S. Ct. 1624 (1995), the Court invalidated a federal law as beyond Congress's Commerce Clause powers and more properly within the authority of the states. In *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), the Court invalidated a federal law that allowed states to be sued in federal courts.

In each of these cases, the Court has made clear that judicial review is to extend to federalism questions as well as to cases involving the separation of powers or individual

rights. As this Court acknowledged in *New York*, "the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases." *New York*, 505 U.S. at 155. Despite the difficulty, however, "at least as far back as *Martin v. Hunter's Lessee*, the Court has resolved questions of 'great importance and delicacy' in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States." *Ibid.* The Ninth Circuit's decision flouts this declaration of constitutional obligation by the Court. Indeed, certiorari is necessary not only to reverse the Ninth Circuit's decision, but also those of other circuits that have invoked the political question doctrine to hold nonjusticiable States' challenges -- under the Tenth Amendment and/or the Invasion Clause -- to the federal government's nonreimbursement policy. *See Padavan*, 82 F.3d at 28; *Chiles*, 69 F.3d at 1097; *New Jersey*, 91 F.3d at 469-70.

The court below found that the meaning and application of the Invasion Clause and the application of the Tenth Amendment to this case constituted political questions outside the competence of the federal judiciary. Pet. App. 11-13, 18. A broad application of the political question doctrine, such as that applied below, ought to be reviewed by this Court in order to ensure that litigants and States are not unconstitutionally being deprived of their right to be heard in federal court. Such a decision by a federal court ought to be reviewed closely by this Court because, unlike other types of non-justiciability — standing, ripeness, and mootness — a finding of a political question means that the specific question of constitutional law, even if meritorious, can *never* be brought in federal court.

Indeed, this Court has demonstrated concern about the seriousness of a finding of a political question by granting review even in the absence of a circuit split. For example, in *Nixon v. United States*, 506 U.S. 224 (1993), this Court reviewed whether impeachment proceedings could be challenged in federal court. Even though this Court ultimately agreed with the District and Circuit Courts for the District of Columbia, which had found the question nonjusticiable, this Court still granted certiorari in order to review the matter. Similarly, this Court has granted certiorari in a number of other cases where the Court's review was necessary to address whether the political question doctrine properly applied. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186 (1962); *Powell v. McCormack*, 395 U.S. 486 (1969); *Goldwater v. Carter*, 444 U.S. 996 (1979); *Davis v. Bandemer*, 478 U.S. 109 (1986); *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986); *United States v. Munoz-Flores*, 495 U.S. 385 (1990); *United States Department of Commerce v. Montana*, 503 U.S. 442 (1992). These cases were not certworthy because of deep circuit splits, but because they raised important questions of federal law. This case raises the same fundamental issue.[7]

Amici are unaware of even a single decision of this Court in which the political question doctrine was invoked to preclude judicial review of Tenth Amendment issues. *New York* well illustrates that the Court has permitted States to press their Tenth Amendment claims in federal court. In light of *New York*, the Ninth Circuit's

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[7] Moreover, as noted above, the Ninth Circuit's holding that California's Tenth Amendment claims raise nonjusticiable political questions appears to conflict with the holdings of the Second, Fifth, and Eleventh Circuits.

unexplained holding that California's Tenth Amendment claims are nonjusticiable political questions merits review by this Court.

Review by the Court is also especially warranted where, as here, a lower court has extended the political question doctrine to a specific clause of the Constitution for the first time. The Court has not had occasion to review the Invasion Clause in any detail, and if the federal courts are to withdraw the judicial power from any cases involving its meaning, this Court ought to make the ultimate decision. To be sure, the Court has found non-justiciable the Guarantee Clause, which immediately precedes the Invasion Clause in Article IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion"). *See Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912). Recent decisions of the Court, however, have suggested that the Guarantee Clause may no longer present a political question, at least in all cases. For example, in *New York v. United States*, the Court noted that it had ruled on the merits in several Guarantee Clause cases at the turn of the century, and it suggested that future claims might be addressable on the merits. *New York*, 505 U.S. at 184-86. In fact, this case can present the Court with the vehicle to reconsider whether its earlier decisions to remove Article IV, § 4 from the purview of judicial review is consistent with the constitutional duties of the Judiciary and with the Supreme Court's role in monitoring the balance between federal and state power.

Even if the Court were to leave its Guarantee Clau jurisprudence undisturbed, it should treat the two claus

differently for political question purposes. As discussed in *Baker v. Carr*, the Court has found the Guarantee Clause to be nonjusticiable because of a lack of "judicially manageable standards which a court could utilize independently in order to identify a State's lawful government." *Baker*, 369 U.S. 186, 223 (1962). That absence of standards should not be an impediment to deciding cases under the Invasion Clause, as members of this Court have taken judicial notice before of "the serious national problems caused by the influx of uncountable millions of illegal aliens across our borders." *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting, joined by Justices Rehnquist, O'Connor and White). Indeed, determining whether an "invasion" of California's borders has occurred may require the Court to do no more than ask whether a substantial number of aliens are currently within the state illegally. In the case of California, that figure is at least 1.7 million people, and it is growing every year.

Even if the Court were to agree with the courts below concerning the lack of judicially manageable standards to adjudicate Invasion Clause claims, it must first hear this case in order to reach that conclusion. Unfortunately, the opinion below provides virtually no explanation as to why there are no manageable standards present here, nor do the other appellate court opinions to which the Ninth Circuit cites. Pet. App. 11-13. If this Court is going to countenance the wholesale withdrawal of judicial review from a significant question of constitutional law — one of great practical importance to the citizens of several of the most populous States in the Union — it ought to grant certiorari in this case in order to explain why.

The Court also should review the decision in this case to clarify other elements of the political question doctrine.

In addition to finding no manageable standards present here, the Ninth Circuit concluded that the Invasion Clause implicated foreign policy concerns committed to the political branches, and hence was nonjusticiable. The Court should grant certiorari in this case to clarify that the application of the political question doctrine to foreign affairs cases does not create an exception to judicial review through which other clauses of the Constitution can be removed from the jurisdiction of the federal courts. The Court has applied the political question doctrine to foreign affairs cases in only a few instances, and it has not done so recently. In fact, in the most recent case raising the issue, the Court firmly rejected efforts to clothe all foreign affairs questions within a cloak of nonjusticiability. In *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986), the Court unanimously rejected the government's argument that it should not review a decision by the Secretary of Commerce that refused to certify that Japan's whaling practices were in violation of an executive agreement. *Japan Whaling*, 478 U.S. at 229. Under the approach taken by the court below, cases such as *Japan Whaling* would never have been decided on the merits by the Supreme Court.

Even if one recognizes the application of the political question doctrine to some aspects of foreign affairs, the Court clearly has refused to apply the doctrine where, as here, the challenged action has significant effects within the United States. For example, the Court did not invoke the political question in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), which contains one of the Court's most significant statements about the foreign affairs power. Nor did the Court turn to the political question doctrine in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), in which it invalidated President

Truman's decision to seize control of the nation's steel mills to continue munitions production for the Korean War effort. The Court also reached the merits in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), in which it upheld the executive agreement with Iran that transferred claims against the Iranian government to an international arbitral tribunal.

In the most recent foreign affairs case to consider seriously the political question doctrine, *Goldwater v. Carter*, 444 U.S. 996 (1979), several Justices recognized that the doctrine ought not to apply to foreign affairs decisions that had important domestic effects. In a concurring opinion, four Justices found that the question of whether the President had the sole authority to terminate treaties was nonjusticiable. The four Justices distinguished *Youngstown Sheet & Tube* on the grounds that "[here we] are asked to settle a dispute between coequal branches of our Government," and "[the] effect of this action, as far as we can tell, is 'entirely external to the United States, and [falls] within the category of foreign affairs.'" 444 U.S. at 1004-05.

Under the criteria set out in *Goldwater*, questions involving the Invasion Clause should be just as justiciable as were the issues addressed in *Curtiss-Wright*, *Youngstown*, and *Dames & Moore*. First, this case does not involve a dispute between coequal branches of the federal government. The Invasion Clause addresses the obligation that the national government as a whole owes to the States, a type of question the Court recently has declared rests within the competence of the Judiciary. California only seeks an opportunity to have its day in court to explain why it believes that the federal government has failed in this obligation. Second, the national government's action (or

inaction) here is not "entirely external to the United States." In fact, the decision here is almost entirely internal to the United States. California is not asking the Court to review the decision of the political branches on immigration policy or on relations with foreign nations that produce large numbers of immigrants. Instead, California is asking the Court to define what obligations the federal government owes the States when it fails to stem the tide of illegal immigration. A finding that the federal government is in default of its obligation in this regard would not interfere in any way with the federal government's prerogatives -- the political branches would still have the freedom to decide upon, and execute, whatever external immigration policy they feel is best.

Because the decision of the appeals court conflicts directly with this Court's decisions on federalism, judicial review, and the political question doctrine, and because it withdraws judicial review from two constitutional issues of great practical and political importance, the Court should grant the petition.

III. The Court Should Decide Whether the Tenth Amendment Allows the Federal Government to Force States to Bear the Fiscal Burden Resulting from Their Federally-Imposed Obligation to Provide Services to Illegal Aliens

Although the Ninth Circuit held that California's Tenth Amendment claims raised nonjusticiable political questions, it nonetheless went on to reject those claims on their merits. The court held that the federal government could not be said to have "commandeered" the California government in requiring it to pay medical costs of illegal aliens, because California voluntarily assumed the

obligation to provide such medical services when it accepted federal Medicaid funds. Pet. App. 17. The court also held that the Tenth Amendment was not implicated by the obligation imposed on California to provide education to illegal aliens, because "the obligation to provide this education derives from an independent constitutional obligation and not federal immigration policy, *see Plyler v. Doe,* 457 U.S. 202, 230 (1982)." *Id.* at 18.

California has cogently explained why the petition should be granted in order to review the Ninth Circuit's denial of Tenth Amendment claims with respect to medical services (Pet. 25-29), and *amici* will not belabor the point. *Amici* nonetheless wish to expand on California's citation to *Plyler* (Pet. 10-11, 29) in support of its Tenth Amendment claim for reimbursement of the cost of education provided to illegal immigrant children.

Federal law requires California public schools to provide a free education to illegal immigrants. This Court held in *Plyler* that States cannot constitutionally restrict an illegal immigrant child's access to a free public education absent federal authorization. The federal government's failure to limit the flow of illegal aliens into the State means that this unfunded federal mandate imposes a significant cost on California taxpayers.

Neither California nor *amici* seek in this litigation to challenge this Court's ruling in *Plyler* or to deprive illegal alien children of an education. The question, rather, is one of fiscal accountability. As five justices in *Plyler* itself suggested (*Plyler,* 457 U.S. at 241 (Powell, J., concurring); *id.* at 242 n.1 (Burger, C.J., dissenting)), because the federal government has exclusive jurisdiction to enforce the immigration laws, it should assume a corresponding

responsibility to compensate California for the burden that inadequate immigration enforcement has imposed upon California's public schools -- about $1.5 billion per year.

The federal government cannot impose such mandates upon a State without offsetting funding. The Court indicated in *New York* that although the federal government can create incentives for a state to operate a federally-desired program, and under certain circumstances can offer grants conditional on the operation of such a program, it lacks the power to hijack state resources unilaterally for its own ends. *New York,* 505 U.S. at 174-77.

The opinions of the lower courts dismissed California's Tenth Amendment claims regarding educational services on the ground that the services were mandated solely by the Constitution and not by either Congress or the Executive Branch. Pet. App. 18. That is simply not true. The majority in *Plyler* indicated that the States would have more flexibility in limiting the access of illegal aliens to public education if the federal government were to articulate a policy authorizing such limitations. The Court repeatedly indicated that its decision hinged on the lack of a contrary federal policy concerning the education of illegal aliens. "[T]he courts must be attentive to congressional policy; the exercise of congressional power might well affect the State's prerogatives to afford differential treatment to a particular class of aliens." *Plyler,* 457 U.S. at 224. "[I]n the area of special constitutional sensitivity presented by these cases, and *in the absence of any contrary indication fairly discernable in the present legislative record,* we perceive no national policy that supports the State in denying these children an elementary education." *Id.* at 226 (emphasis added).

Thus, the holding in *Plyler* in no way forecloses, and in fact invites, congressional action, including action that would effectively resurrect the same state statute found invalid in *Plyler*. *See* E. Hull, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe,* 44 U. Pitt. L. Rev. 409, 430 (1983). Indeed, in *DeCanas v. Bica,* 424 U.S. 351 (1976), the Court permitted California to regulate the employment of illegal aliens -- barring them from working "if such employment would have an adverse effect on lawful resident workers," *id.* at 352 -- because Congress had implicitly authorized such measures.

Contrary to the Ninth Circuit's contention, then, Congress can legitimately be said to have imposed the educational mandate upon California. This Court held in *New York* that the coercive imposition of such a mandate without offsetting compensation is unlawful. Whether the mandate is viewed "as lying outside Congress' enumerate powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution." *New York,* 505 U.S. at 177.

Five Justice in *Plyler* argued that the federal government should share the costs associated with its failure to enforce the immigration laws effectively. Chief Justice Burger, joined by three other Justices, stated in dissent:

> It does not follow . . . that a state should bear the costs of educating children whose illegal presence in this country results from the default of the political branches of the Federal Government. A state has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the Executive. If the

> Federal Government, properly chargeable with deporting illegal aliens, fails to do so, it should bear the burdens of their presence here. Surely if illegal alien children can be identified for purposes of this litigation, their parents can be identified for purposes of prompt deportation.

Plyler, 457 U.S. at 242 n.1. Justice Powell indicated his agreement. *Plyler,* 457 U.S. at 241 (Powell, J. concurring). The four dissenters and Justice Powell accurately noted the jumbled logic of the current system. Only the federal government can enforce immigration laws; if the federal government fails in its enforcement, it should bear the costs of its failure. Otherwise, the States would be forced to bear costs that they are powerless to protect themselves against, an outcome that the five Justices in *Plyler* recognized as absurd.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Nos. 96-1595 and 96-1596

In the Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF ARIZONA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' contention that the federal government has violated the Invasion Clause of Article IV, Section 4 of the Constitution by failing to prevent the presence of illegal aliens in the States of California and Arizona presents a justiciable claim.

2. Whether the federal requirement that States must provide emergency medical treatment for illegal aliens under the Medicaid program if they are to receive federal Medicaid funds, or the fact that the State incurs substantial costs in incarcerating illegal aliens who commit crimes within the State, violates the Tenth Amendment.

3. Whether petitioners' claim that the Attorney General should use a lump-sum appropriation earmarked for the general enforcement of the immigration laws by the Immigration and Naturalization Service (INS) to reimburse States for the costs of incarcerating illegal aliens for violation of state-law offenses is subject to judicial review under the Administrative Procedure Act.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 96-1596 (Pet. App. 1-24[1]) is reported at 104 F.3d 1086. The order of the court of appeals in No. 96-1595 (96-1595

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[1] Except as otherwise indicated, references to "Pet. App." are to the Appendix to the Petition in No. 96-1596.

Pet. App. 1) is reported at 104 F.3d 1095. The opinion of the district court in No. 96-1596 (Pet. App. 1-49) is unreported. The opinion of the district court in No. 96-1595 (96-1595 Pet. App. 24-36) is unreported.

JURISDICTION

The judgments of the court of appeals in both cases were entered on January 7, 1997. The petitions for a writ of certiorari in both cases were filed on April 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioners in No. 96-1596—the State of California, Governor Pete Wilson, the state director of finance, and officials of state youth, correctional, and public health agencies—brought suit asserting a variety of constitutional and statutory claims against the United States and federal officials with regard to the migration of illegal aliens into California. Among other contentions, petitioners claimed that the federal government's failure to prevent an influx of illegal aliens into California constitutes a violation of the Invasion Clause of the Constitution. Pet. App. 11. That Clause provides that the United States shall "guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion." Art. 4, § 4.

Petitioners also alleged violations of the Tenth Amendment. They claimed that the United States had unconstitutionally conditioned California's receipt of federal Medicaid funds on the State's provision and partial funding of emergency medical care under the Medicaid program to needy illegal aliens. Petitioners also claimed that federal immigration policy violates the Tenth Amendment because it

causes the State to incur the costs of incarcerating illegal aliens who commit crimes within the State. Pet. App. 15-17.

Petitioners' complaint sought reimbursement for the State's costs of providing emergency medical care, public education, and incarceration to illegal aliens. Petitioners also sought a declaration that the Attorney General violated 8 U.S.C. 1365, which authorizes distribution of appropriated funds to the States to compensate them for the costs of incarcerating illegal aliens convicted of state felonies, because she had failed to provide petitioners with reimbursement out of funds that were available but that had not been specifically appropriated for that purpose. Pet. App. 8-11.[2]

b. In No. 96-1596, the district court granted the federal government's motion to dismiss petitioners' complaint under Federal Rule of Civil Procedure 12(b)(6). Although the court rejected petitioners' contention that the illegal migration of aliens into the United States constitutes the sort of "invasion" that could trigger Article IV, Section 4, see Pet. App. 32-34, the court ultimately held that the Invasion Clause claim presents "a non-justiciable, political question solely in the hands of Congress and the Executive Branch." *Id.* at 34. The court explained that the Constitution commits matters concerning immigration to Congress, not the courts, and that in any event "there

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[2] Section 1365(a) provides:

> Subject to the amounts provided in advance in appropriation Acts, the Attorney General shall reimburse a State for the costs incurred by the State for the imprisonment of any illegal alien or Cuban national who is convicted of a felony by such State.

is simply no judicially * * * manageable standard to determine at what point a migration becomes an invasion under Article IV." *Id.* at 35.

The district court also rejected petitioners' Tenth Amendment claims. Pet. App. 37-39. The court held that the statute conditioning a State's receipt of federal Medicaid funds on its agreement to provide medical care for needy illegal immigrants is a "valid condition" on receipt of federal funds that "is not coercive for purposes of the Tenth Amendment." *Id.* at 37, 38. The court noted that petitioners' argument that the condition is invalid would lead to the unusual conclusion "that the Federal Government couldn't even eliminate its allocation of Medic[aid] funds because the states are dependent." *Id.* at 38. The court rejected petitioners' claim that the United States is responsible under the Tenth Amendment for their incarceration of illegal aliens who commit crimes, "because the cost of incarcerating illegal aliens stems not from federal law but from the State's obligation to enforce its own law and its prosecution of illegal aliens for state criminal offenses." *Id.* at 41.

Finally, the district court held that petitioners' claims for reimbursement of the costs of educating, incarcerating, and providing health care are in any event barred by sovereign immunity. The court noted that the Administrative Procedure Act, 5 U.S.C. 702, does not provide a waiver of the United States' sovereign immunity from monetary claims and that petitioners' claims, though pleaded "as equitable and in the nature of restitution and reimbursement," are "in fact claims for money damages, against which [respondents] are immune." Pet. App. 47-48.

2. a. Petitioners in No. 96-1595—the State of Arizona, Governor Fife Symington, III, and the directors

of state correctional and youth agencies—brought a suit similar to that brought by the California plaintiffs, asserting similar constitutional and statutory claims against the United States and federal officials with regard to the migration of illegal aliens into Arizona.

b. In No. 96-1595, the district court rejected petitioners' claims. 96-1595 Pet. App. 24-36. With respect to the Invasion Clause claim, the court held that "[petitioners'] challenge under the Invasion Clause presents a political question best left to the political branches." *Id.* at 30. The court noted that "Congress possesses complete legislative authority over the admission of aliens," *id.* at 29, and that "no judicially manageable standards exist for the [c]ourt to apply to determine if and when a migration of immigrants becomes an 'invasion,'" *id.* at 30. The court also rejected petitioners' Tenth Amendment claim regarding the costs of incarcerating illegal aliens, holding that "the [federal] Government has not 'commandeered' Arizona's legislative process" and that "[t]he cost of incarcerating illegal aliens results not from federal law but from Arizona's own decision to prosecute illegal aliens for criminal offenses defined by Arizona law." *Id.* at 32.

The court also held that sovereign immunity barred petitioners' claim for reimbursement under 8 U.S.C. 1365. 96-1595 Pet. App. 33-34. With respect to petitioners' claims that they are entitled to funds that had not been specifically appropriated under Section 1365 to pay the costs of incarcerating illegal aliens, the court noted that the funds sought had been appropriated under lump-sum appropriations laws. The court therefore held that the decision regarding

allocation is committed to agency discretion and not subject to judicial review. *Id.* at 34-35.

3. The court of appeals affirmed in the California case, in a published opinion. Pet. App. 1-24. The court concluded that California's Invasion Clause claim is nonjusticiable. *Id.* at 11-13. The court explained that "[f]or this [c]ourt to determine that the United States has been 'invaded' when the political branches have made no such determination would disregard the constitutional duties that are the specific responsibility of other branches of government, and would result in the [c]ourt making an ineffective non-judicial policy decision." *Id.* at 12. The court also noted that "there are no manageable standards to ascertain whether or when an influx of illegal immigrants should be said to constitute an invasion." *Ibid.*

The court of appeals affirmed the dismissal of petitioners' Tenth Amendment claims on the merits. With respect to the Medicaid-based claims, the court concluded that, under settled law, the conditioning of Medicaid funds on California's agreement to provide medical care for needy illegal immigrants was not "coercion" of the State that could violate the Tenth Amendment. Pet. App. 15-17. Noting that "no party challenging the conditioning of federal funds has ever succeeded under the coercion theory," *id.* at 16, the court held that the present record failed to disclose the kind of "extraordinary" circumstances under which such coercion could be found. *Ibid.* With respect to the Tenth Amendment claims based on the costs of incarcerating illegal aliens, the court held that, "because no federal mandate requires California to pursue a penal policy resulting in" the State's incurring costs to incarcerate illegal aliens, petitioners

failed to allege a Tenth Amendment claim based on the fact that the State incurred those costs. *Id.* at 17.

With respect to petitioners' claim to reimbursement from lump-sum appropriations for expenses of incarcerating illegal aliens, the court agreed with the district court that "the Attorney General's decision to allocate monies generally appropriated to her in a lump-sum for the administration of the immigration laws for the specific purpose of reimbursing a State for the costs of incarcerating illegal aliens under 8 U.S.C. § 1365 is 'committed to agency discretion by law' and is not subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2)." Pet. App. 19-20 (citing *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993)).

4. The court of appeals affirmed in the Arizona case in a brief order (96-1595 Pet. App. 1-2), "[f]or the reasons set forth in" the court's opinion in the California case. See also Pet. App. 7 n.1 (explaining that the substantive issues were addressed in the opinion in the California case because California presented claims in addition to those presented by Arizona).

ARGUMENT

The decision of the court of appeals is correct and is consistent with rulings of the Second, Third, Fifth and Eleventh Circuits, all of which have affirmed dismissal of similar claims. Further review is not warranted.

1. Petitioners contend (96-1596 Pet. 10-24; 96-1595 Pet. 16-18, 21-22) that by failing to halt the influx of illegal immigrants into California and Arizona, the federal government has breached its constitutional duty to "protect each [State] against Invasion." U.S. Const. Art. IV, § 4. As both district courts and the

court of appeals concluded, that claim presents a nonjusticiable political question. Pet. App. 11-13, 34-35.

The Constitution provides no "judicially discoverable and manageable standards for resolving" petitioners' claim. *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). In particular, the Constitution provides no criteria for determining when, if ever, a peacetime influx of migrants should be deemed to have risen to the level of an "invasion," or for assessing the adequacy of the federal government's response to such a threat. Adjudication of such a claim would require a court to "review the * * * entire enforcement of Federal immigration laws including the enforcement methods used and their effectiveness, determine the reasonableness of budget allocations, determine whether more resources are available and, if so, decide how those addition[al] resources should be allocated." *Chiles* v. *United States*, 874 F. Supp. 1334, 1344 (S.D. Fla. 1994), aff'd, 69 F.3d 1094 (11th Cir. 1995), cert. denied, 116 S. Ct. 1674 (1996). The Constitution provides no yardstick for determining when the federal government's indisputably massive expenditures on immigration control should be deemed a sufficient response under the Invasion Clause (even if we assume, *arguendo*, that the Clause applies in this setting), and it provides no means for determining what additional efforts should be compelled.

In addition, there is a "textually demonstrable constitutional commitment of the issue [of immigration and its control] to a coordinate political department." *Baker* v. *Carr*, 369 U.S. at 217. As this Court held in *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977), "'over no conceivable subject is the legislative power of Congress

more complete than it is over' the admission of aliens." See also *Mathews* v. *Diaz*, 426 U.S. 67, 81-86 (1976) (Constitution commits to the federal government the exclusive power to control immigration). Admission of aliens into the United States and control over the borders are matters firmly entrusted to the political branches. And protection of the United States from illegal immigration implicates matters of foreign policy and defense into which courts will intrude only with the greatest reluctance. See, *e.g.*, *Barclays Bank PLC* v. *Franchise Tax Bd. of Cal.*, 512 U.S. 298, 327-328, 330-331 (1994); *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993).

Finally, as the court of appeals recognized (Pet. App. 13), petitioners' claim misapprehends the intent of the Invasion Clause. The Constitution commits the national defense to the United States, and the Invasion Clause recognizes that it is the United States' role to protect against invasion. See also Art. I, § 8, Cl. 15 (listing among enumerated powers of Congress "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"). The conclusion that the Constitution refers to "invasion" in the sense of a hostile, presumably military invasion also is supported by its use in Art. I, § 9, Cl. 2, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[3]

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[3] That understanding of "invasion," as used in the Constitution, is fully consistent with 18th century usage. Dr. Johnson defined "invasion" as a "[h]ostile entrance upon the rights or possessions of another; hostile encroachment." 1 S. Johnson, *A*

2. a. The California petitioners contend (96-1596 Pet. 25-29) that their expenditures on emergency medical care for illegal aliens pursuant to the Medicaid program, coupled with the federal government's failure to halt all illegal immigration, contravenes the Tenth Amendment. The court of appeals correctly held that petitioners failed to state a claim under the Tenth Amendment.

Under this Court's Tenth Amendment jurisprudence, "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York* v. *United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). See also *United States* v. *Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (*New York* v. *United States* involved "a formal command from the National Government directing the State to enact a certain policy"). Petitioners, however, identify no federal directive to the States regarding the treatment of illegal aliens, much less a directive that would commandeer the State's legislative or policy-making apparatus. The federal immigration policies at issue in this case do not require petitioners to enact or enforce a federal regulatory program.

The fact that the State may obtain federal Medicaid funds only subject to the condition that it provide emergency medical care under the Medicaid program to needy illegal aliens is not an unconstitutional

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Dictionary of the English Language (1755). Similarly, Dr. Johnson's primary definition of "invade" is "[t]o attack a country; to make an hostile entrance. He will *invade* them with troops." *Ibid.*

federal directive to the States that "commandeers" California's legislative or policy-making apparatus.[4] Medicaid is a voluntary federal spending program in which States may decline to participate. *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990); *Harris* v. *McRae*, 448 U.S. 297, 301 (1980). In exercising its powers under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, Congress may "attach conditions on the receipt of federal funds." *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). Federal actions that "encourage" or "provide incentives" for States to adopt certain policies do not violate the Tenth Amendment. See *New York* v. *United States*, 505 U.S. at 174-176; see also *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 292 n.33 (even if the statute's "requirements will have a measurable impact on [the State's] economy, this kind of effect, standing alone, is insufficient to establish a violation of the Tenth Amendment"). Although those conditions "may influence a State's legislative choices," such influence does not violate the Tenth Amendment. *New York* v. *United States*, 505 U.S. at 167. See also *id.* at 171-173; *Oklahoma* v. *Civil Serv. Comm'n*, 330 U.S. 127, 142-44 (1947).

Petitioners argue (96-1596 Pet. 27) that, as a practical matter, California would not make the decision to

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[4] States choosing to participate in the Medicaid program are reimbursed with federal funds for a percentage of their costs in providing medical services to the needy. See 42 U.S.C. 1396. States are reimbursed for medical services provided to illegal aliens, but only for those services necessary to care for emergency conditions. 42 U.S.C. 1396b(v). Concomitantly, a State that wishes to receive Medicaid funds must provide emergency (but not non-emergency) medical services to illegal aliens. 42 C.F.R. 440.255(c).

forgo federal Medicaid funds and that the requirements of the Medicaid program thus constitute impermissible coercion. But "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Dole*, 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 589-590 (1937)). California has voluntarily elected to participate in the Medicaid program, presumably concluding that its benefits outweigh its costs. As the district court observed, petitioners' "acceptance of the Federal Government's $30 billion Medicaid grant is conditioned on California spending $1.7 billion for emergency Medicaid to illegal aliens." Pet. App. 38. California may not evade those costs by characterizing them as the product of unlawful coercion.

b. The Arizona petitioners contend (96-1595 Pet. 19, 20) that the federal government has "impermissibly shift[ed] the burden of implementing its immigration policy onto the State" by requiring the State, "at no economic or political cost to the federal government, [to] retain thousands of illegal inmates in its criminal justice system."

The court of appeals correctly held (Pet. App. 17) that petitioners failed to state a claim under the Tenth Amendment. The federal government has issued no directive to the States regarding the incarceration of illegal aliens, much less a directive that would commandeer the State's legislative or policy-making apparatus. The federal immigration policies at issue here are administered by federal agencies; their implementation does not require Arizona to enact or enforce a federal regulatory program.

As the court of appeals recognized, a State cannot properly premise a Tenth Amendment claim on its decision to expend resources to deal with problems

created by illegal aliens within the State's borders. The Tenth Amendment provides a shield against impermissible federal directives, not a sword to compel federal action. Concerns of the kind presented here by Arizona are dealt with through the political process. And, as noted below, see pp. 14-15 & n.5, *infra*, the political process has indeed resulted in a massive commitment of federal resources to the problem of illegal aliens incarcerated by the States for violations of state law.

3. Petitioners in the Arizona case argue (96-1595 Pet. 13-16) that they are entitled to a declaration that, in addition to any funds that Congress may specifically appropriate under 8 U.S.C. 1365 to reimburse the States for their costs of incarcerating illegal aliens, various lump-sum congressional appropriations are also available to provide funds for that purpose.

Under Section 1365, the Attorney General is authorized to reimburse the States for the costs of incarcerating illegal aliens convicted of state crimes. Section 1365, however, does not appropriate any funds, and it is expressly made "[s]ubject to the amounts provided in advance in appropriation Acts." 8 U.S.C. 1365(a). Congress enacted a specific appropriation of $130 million under Section 1365 for Fiscal Year 1995. Department of Justice and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, Tit. VIII, 108 Stat. 1778. See State Criminal Alien Assistance Program, 59 Fed. Reg. 50,830, 50,833 (1994). For Fiscal Year 1994, however, as for previous years, Congress appropriated no monies for distribution pursuant to 8 U.S.C. 1365.

Petitioners argue (96-1595 Pet. 13-16) that the Attorney General should have been required to dis-

tribute to the States, pursuant to 8 U.S.C. 1365(a), monies from the lump-sum appropriation made to the INS for salaries and expenses in fiscal year 1994. The court of appeals properly rejected that claim. By its terms, Section 1365(a) limits the Attorney General's authority to distribute monies to "amounts provided in advance in appropriation Acts." 8 U.S.C. 1365(a). Moreover, the court of appeals correctly reasoned that, even assuming that the Attorney General would have authority to make the distribution that petitioners sought, her decision not to use funds from lump-sum appropriations for purposes described in Section 1365(a) would be committed to agency discretion by law. 96-1595 Pet. App. 17. That conclusion is fully consistent with this Court's decision in *Lincoln* v. *Vigil*, 508 U.S. 182 (1993), in which the Court emphasized that the courts have "no leave to intrude" on an agency's allocation of a lump-sum appropriation, as long as the agency acts "to meet permissible statutory objectives." *Id.* at 193. The Attorney General's use of funds appropriated for INS salaries and expenses for the very purposes identified by Congress does not give rise to a reviewable claim.

Petitioners' contention is particularly anomalous in light of the fact that Congress has appropriated large sums in the years since this suit was filed for the specific purpose of helping States and localities deal with illegal aliens incarcerated for violations of state or local law. In the Violent Crime Control and Law Enforcement Act of 1994, Congress created a new statutory mechanism for that purpose and authorized amounts to be appropriated by Congress for Fiscal Year 1996 and following years. See Pub. L. No. 103-322, § 20301(a), 108 Stat. 1823-1824, adding 8 U.S.C. 1252(j). Congress appropriated a total of $500

million to fund Section 1252(j) in both Fiscal Year 1996 and Fiscal Year 1997.[5]

4. The ruling of the court of appeals is consistent with that of the four other courts of appeals that have addressed similar claims. See *Chiles* v. *United States*, 69 F.3d 1094 (11th Cir. 1995) (rejecting Invasion Clause and Tenth Amendment claims), cert. denied, 116 S. Ct. 1674 (1996); *Padavan* v. *United States*, 82 F.3d 23 (2d Cir. 1996) (same); *New Jersey* v. *United States*, 91 F.3d 463 (3d Cir. 1996) (same); *Texas* v. *United States*, 106 F.3d 661 (5th Cir. 1997) (rejecting Tenth Amendment claims). The Court denied review in the *Chiles* case last Term. There is no reason for a different disposition here, especially in light of the intervening decisions of other courts of appeals reaching the same result.

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[5] For Fiscal Year 1996, Congress appropriated $300 million for Section 1252(j). 142 Cong. Rec. H3846 (daily ed. Apr. 25, 1996). Congress also authorized an appropriation of an additional $200 million from the Violent Offender Incarceration and Truth-In-Sentencing Incentive Grants established by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 20102, 20103, 108 Stat. 1816-1817. 142 Cong. Rec. H3846 (daily ed. Apr. 25, 1996). For Fiscal Year 1997, Congress appropriated $330,000,000 "for the State Criminal Alien Assistance program, as authorized by section 242(j) of the Immigration and Nationality Act." Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 101(a), 110 Stat. 3009-14. In addition, Congress provided that "$170,000,000 shall be available for payments to States for incarceration of criminal aliens." *Ibid.*

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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